

BAIL FAIL:

**WHY THE U.S. SHOULD END
THE PRACTICE OF USING MONEY FOR BAIL**

JUSTICE POLICY INSTITUTE | SEPTEMBER 2012



The Justice Policy Institute is a national organization focused on reducing the use of incarceration and the justice system and promoting policies that improve the well-being of all people and communities.

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“What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?”

—U.S. Attorney General Robert Kennedy¹

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Money determines
pretrial release for

**7 OUT
OF 10**

people accused of felonies.

PART 1

INTRODUCTION

The vaguely understood pretrial process of bail costs the taxpayers of the United States billions of dollars and infringes on the liberty and rights of millions of Americans each year.

Fortunately, there are alternatives that states and localities can pursue that have been shown to effectively promote safety, deliver justice, and decrease the number of people in jails all while reducing the price of this incarceration to taxpayers and those directly impacted.

Numerous reports and studies have supported the elimination of money bail since the early 1900's; however, reform efforts have been slow. With the era of mass incarceration putting the United States at the top of the world regarding the number of its residents behind bars, the need for reform has become increasingly urgent. States that cannot maintain burgeoning criminal justice systems are now open to safer, more effective ideas.

Current policies and practices around money bail are among the primary drivers of growth in our jail populations. On any given day, 60 percent of the U.S. jail population is composed of people who are not convicted but are being held in detention as they await the resolution of their charge. This time in detention hinders them from taking care of their families, jobs and communities while overcrowding jails and creating unsustainable budgets. In 2011, detaining people in county jails until their

court dates was costing counties, alone, around \$9 billion a year.²

The use of bail money is generally accepted for securing release from jail after an arrest. It is a part of our culture: there are jokes about getting bail money if one anticipates getting into trouble and a very common fundraiser involves donating dollars in order to “bail out” a person raising money for a cause. However what is not well known is that starting at the time of arrest, many people charged with an offense undergo a confusing, coercive, and expensive process intended to deliver justice. Constitutional safeguards, court rulings, and laws provide for both the protection of people who are accused of offenses, as well as, the power of government to pursue justice and safety in the community. However, the extensive use of money bail as the primary release mechanism has distorted the pretrial justice process. While cases are resolved, justice is not always served and our communities are not always safer.

However, the ability to pay money bail is neither an indicator of a defendant's guilt nor an indicator of risk in release. The focus on money alone as a mechanism for pretrial release means people often

are not properly screened for more rational measures of public safety risk: their propensity to flee before their court date or their risk of causing public harm. Meanwhile, those too poor to pay a money bail remain in jail regardless of their risk level or presumed innocence. Evidence suggests that up to 25 percent more people could be safely released from U.S. jails while awaiting trial if the proper procedures are put in place,³ including valid risk assessments and appropriate community supervision.

This report provides an explanation and analysis of the use of money bail in the pretrial justice system. The following sections are designed to facilitate meaningful discussion and reform:

- Overview of the pretrial process so that even readers with little to no familiarity with the process can understand what may happen from arrest through a charge being resolved.
- Discussion of issues involved in the use of money bail, such as disproportionate impact on certain communities, loss of liberty, and its linkage to the practice of plea-bargaining.
- Overview of more effective, just, and cost-saving practices to give readers an idea of what could be done instead of depending on money bail.
- Recommendations for beginning to practically address the issue of money bail.

There are vastly more effective and cost-saving practices that should replace money bail as our primary release mechanism. By implementing more effective and efficient programs and services, various jurisdictions across the U.S. are demonstrating the cost savings and enhancement of community safety that could be gained.

PART 2

BACKGROUND AND CONTEXT

Between June 2010 and June 2011, about 11.8 million people were processed through jails across the United States. At midyear 2011, the total U.S. jail population was 735,601 people. U.S. jails have operated at an average of 91 percent capacity since the year 2000, resulting in a huge financial burden to states, cities, and counties.⁴

Since 2005, a majority of people held in jail have not been convicted of the offense for which they are charged: approximately 60 percent of people in jails are merely awaiting trial or are in the trial process for the offense in question.⁵

The Fifth, Sixth, and Fourteenth Amendments provide the constitutional basis for the legal principle commonly referred to as “innocent until proven guilty,” which is a critical safeguard within our criminal justice system. The Sixth and Fourteenth Amendments, along with many court rulings since their passage, also provide guidance for if, when, and how long, courts may order the detainment of an accused individual. The Eighth Amendment of the U.S. Constitution provides that bail not be excessive for people accused of offenses. These protections are in place so that the courts may adequately examine a person’s guilt or innocence, while also safeguarding the person’s life and liberty.

There are no national data regarding how long people stay in jail until their case is resolved; however, in the 75 most populous counties, people accused of felonies who did not post bail in 2002 waited a median of 51 days in jail until trial (that is,

more than a majority waited 51 days or more). Median waits ranged from 31 days for forgery to more than 150 days for rape charges.⁶

THE PRETRIAL SYSTEM IS A COMPLEX PROCESS TO NAVIGATE.

What pretrial process a person will go through depends on the state and jurisdiction in which he or she is arrested. The United States Constitution’s Fifth Amendment affirms that people cannot be deprived of their liberty without due process of law. However, states and jurisdictions have varying laws on detainment for capital offense charges, consideration of safety, and requirements around imposing the least restrictive bail conditions. The American Bar Association and the National Association of Pretrial Service Agencies have provided standards to guide pretrial activities; however, at this time, many practices do not yet comply with these recommendations.

SUMMONS AND CITATIONS: In some jurisdictions, law enforcement has the option to dispense

THE HISTORY OF PRETRIAL DETENTION AND USE OF BAIL

THE USE OF PRETRIAL DETENTION AND BAIL IN MOTIVATING APPEARANCE AT COURT HEARINGS HAS AN EXTENSIVE HISTORY.

As early as 1275, officials in England were debating and curtailing the use of pretrial detention and bail. The use of bail carried over from England into the U.S.; however, initial laws greatly limited the use of pretrial detention and excessive bail. The role of the for-profit bail industry began in the United States in the 1800's primarily due to the lack of large family or community ties as well as large areas where a defendant could flee during the settling of the country.

However, as early as 1920, critiques of the bail system's use of for-profit bail bonding companies emerged and called for alternatives to surety bonds. Even then, the bail bonding system was criticized as it "neither guarantees security to society nor safeguards the right of the accused." Recommendations were made for the use of citations rather than arrests and systematic "fact-finding" in determining bail for the accused. In 1954, reports began to show that an increasing majority of people detained while awaiting trial were of low income; these observations paved the way for pilot programs, such as the Manhattan Bail Project, testing the use of Release-On-Recognizance and other forms of pretrial release.

Due largely to reform efforts, the Bail Reform Act of 1966 was passed which created a foundation for reducing dependence on money bail and increasing the use of nonfinancial release options. The Bail Reform Act of 1984, a component of a larger Comprehensive Crime Control Act of 1984, added the consideration of safety in the community as a factor in pretrial release decisions. Challenges to this Act were defeated in *United States v. Salerno*, in which the Supreme Court concluded that the protection the Act provided did not violate Constitutional rights as long as detention was not applied excessive.

Since the 1970s, various states and jurisdictions have worked to improve the pretrial process through various programs and pilots; meanwhile, the for-profit bail bonding industry has continued its efforts to keep for-profit bail companies a part of the judicial system.

citations or summons for certain charges in order to reduce the number of arrests and lessen the burden on the local jail to process people charged of offenses. The process from arrest to charge resolution generally proceeds as shown in the flow chart “The General Pretrial Process”; however, the specifics and requirements involved will vary among jurisdictions.

UPON ARREST: Depending on the potential or actual charge and the jurisdiction, a person may be released from the police station after having their charge processed and bail set there. Others may have to go through a booking at a jail prior to having bail set. Booking typically involves paperwork to collect personal information, details about the arrest and charge, and, in some jurisdictions, fingerprinting and a photograph. Usually, the accused person is then held in detention until appearing before a judicial officer or a judge to have the conditions of their release set.

BAIL SETTING: The Supreme Court has affirmed that people have the right to counsel at the bail setting before a judicial officer;⁷ however, this is not provided in most jurisdictions. In some places, a second bail hearing or review will be held very soon after the first bail determination where the original decision of whether to grant bail and how much can be reviewed by the judge; counsel for the defendant is required at this hearing in some places. In other places, only if a person requests it will they get a second bail hearing.

BAIL DENIED: In accordance to the laws of the jurisdictions, judicial officials may deny bail to prevent the pretrial release of people accused of certain offenses. In accordance to the Bail Reform Act of 1984, most states allow for bail to be denied for capital offenses, which are crimes punishable by death. Around 28 states have laws that allow for bail to be denied for charges other than capital offenses with rationales that vary greatly. Often

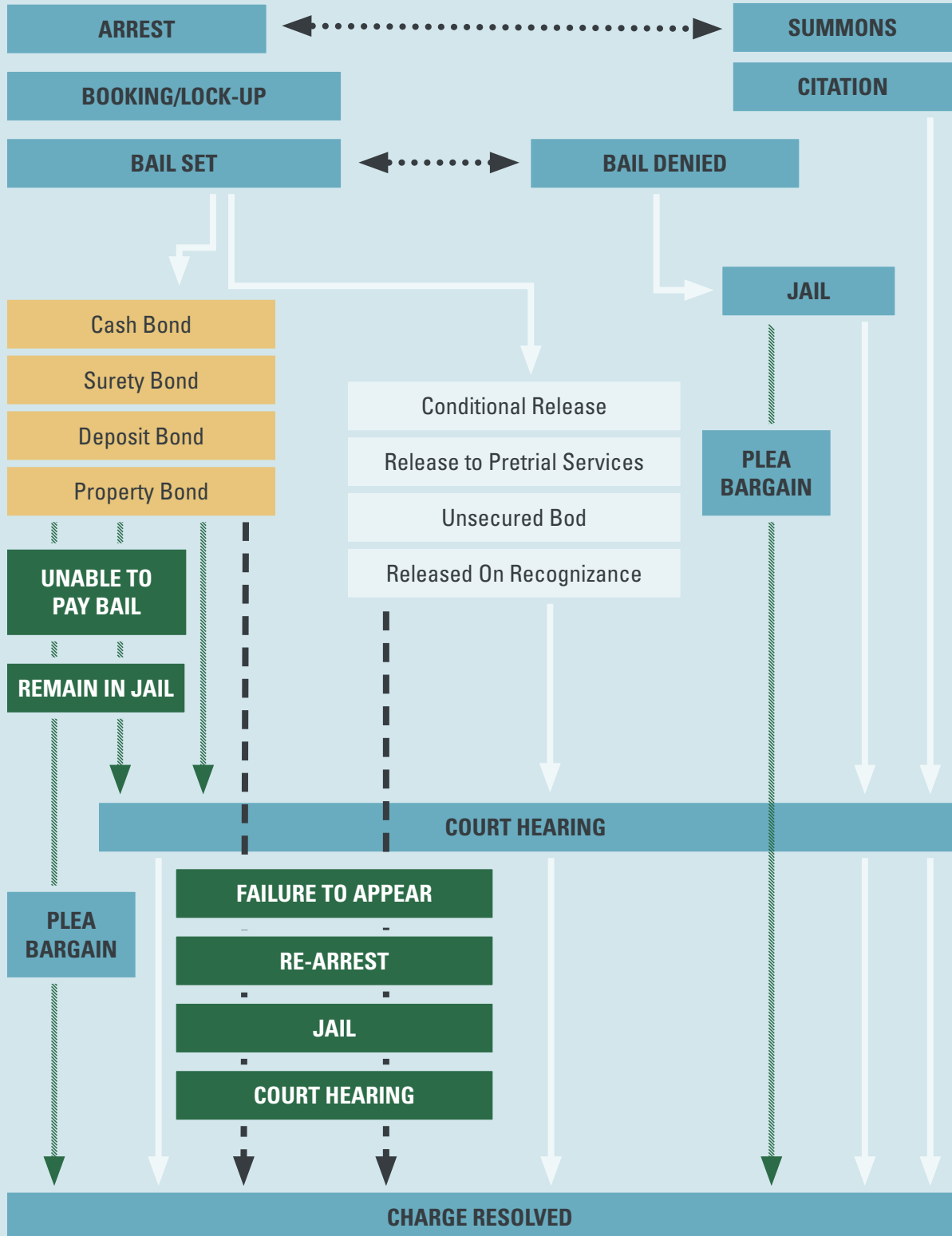
courts may detain people charged with a particular offense of interest to the state, with prior conviction history, and/or having the status as an undocumented immigrant. About 21 states have laws disallowing the detainment of people for charges other than capital offenses, and at least two states—Alaska and Tennessee—do not allow courts to deny bail even for capital offenses.⁸

RELEASE ON BAIL: There are several ways a person may be released after their arrest as they await their court date.

Release options that do not involve money upfront:

- Release on recognizance—The person signs a contract agreeing to appear in court for their hearing as required.
- Unsecured bond—The person signs a contract agreeing to appear in court for their hearings and accepting liability for a set amount of money should they not appear in court as required.
- Conditional release—The person is given a list of stipulations that must be honored in order to remain out of jail while awaiting trial. These often include drug and alcohol use screenings, orders to attend mental or substance abuse disorder treatment, and/or monitoring by a third party, such as a family member, pretrial service agency, or others.
- Release to pretrial services—Where available, someone may be required to be supervised by a pretrial services agency. These organizations typically conduct risk assessments and provide the appropriate supervision as indicated by risk assessment findings.

THE GENERAL PRETRIAL PROCESS



Release options that require money in order to get out of jail pretrial:

- **Cash bond**—The person (or their friends and family) pays the bail amount in full in order to be released from jail. Upon return to court, they will be reimbursed this money (less administrator’s or other court fees). Some jurisdictions allow cash bail to be paid with a credit card; others forbid this.
- **Deposit bond**—The person pays a percentage of the bail amount (usually 10 percent) with the understanding that failing to appear to court will make them liable for the full bail amount. This percentage usually is required in the form of cash or a payer’s check.
- **Commercial bail bond**—Also known as a surety bond, the person (or their friends and family) gets a bail bondsman (a private citizen working for a for-profit bail bonding company) to sign a promissory note to the court for the full bond amount. They are required to pay the bondsman a non-refundable fee that is typically 10% of the bond amount. Depending on the bondsman, some people will be required to put up collateral as well (such as a vehicle, home, etc.).
- **Property bond**—In lieu of cash, the person may provide a deed and other paperwork to allow the courts to put a lien on a property for the value of the bond amount. Until the person appears in court, the court holds the deed on a house or title to other property such as a boat or car.

Sometimes, judges or court representatives will mix the release options. A person may be required to sign for an unsecured bond and abide under certain conditions to be released. In other situations, judges will require that a person post a money bond while also remaining under supervision of pretrial service agencies.

HELD ON BAIL: When a bail is assigned that requires money upfront, people who are unable to pay are “held on bail” in jail until their court hearing or the charge is resolved (usually through a plea bargain).

The general pretrial process is described in the following flow chart. However, each jurisdiction will differ in the specifics of how the process will proceed; therefore, this chart is only intended as a general explanation of the steps a typical person may encounter from arrest until their charge is resolved through acquittal, having charges dropped, or conviction.

PART 3

THE USE OF MONEY BAIL

According to the most recently released State Court Processing Statistics data, the proportion of people charged with a felony who were granted nonfinancial release declined by 32 percent from 1992 to 2006; at the same time, financial release, primarily through commercial bonds, increased by 32 percent.

THE USE OF FINANCIAL RELEASE HAS INCREASED OVER THE PAST YEARS.

Release on recognizance was the most common type of pretrial release in 1992; however, its use had declined by 33 percent by 2006. Overall, 70 percent of people charged with a felony were assigned money bail in 2006. The proportion of people detained pretrial increased by about 14 percent to a high of 42 percent of all those charged with felonies in 2006 (only 5 percent of these were held without bail).⁹

THE AMOUNT OF MONEY BAIL SET FOR DEFENDANTS' RELEASE HAS RISEN.

A Bureau of Justice Statistics survey of felony cases in the 75 most populous counties of the U.S. showed that average bail amounts have increased by over \$30,000 between 1992 and 2006,¹⁰ posing a serious concern for indigent populations involved in the criminal justice system. Average amounts

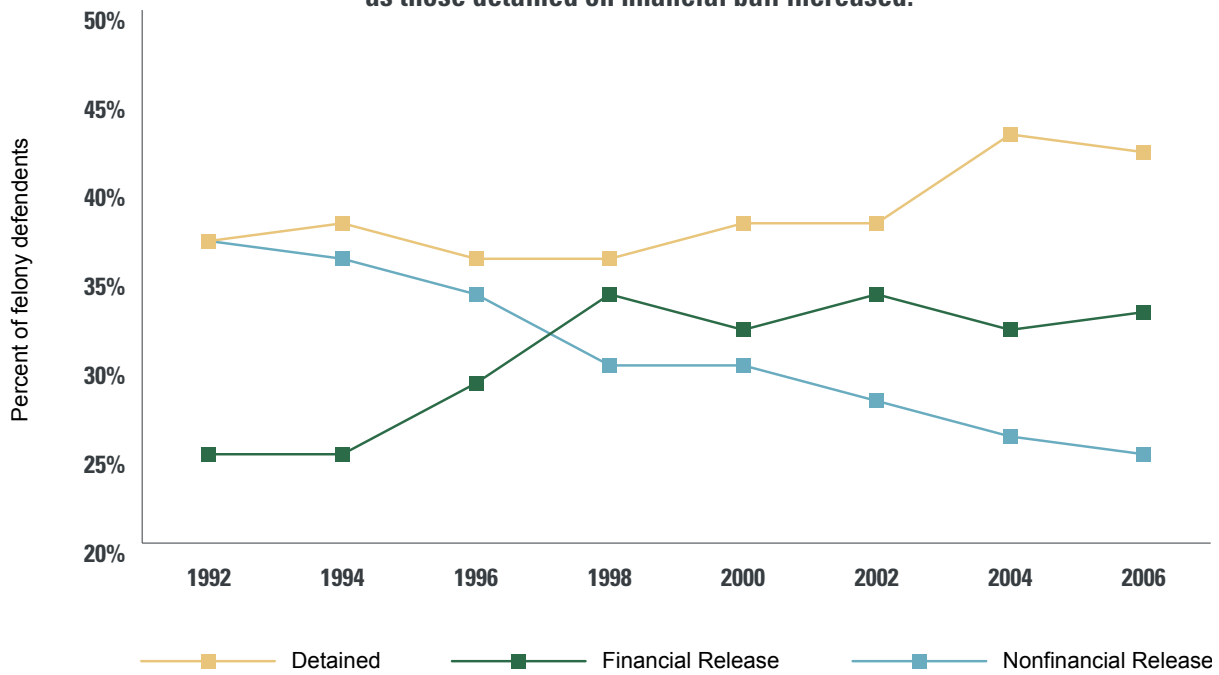
for those detained until their hearing more than doubled from an average bail of \$40,000 in 1992 to \$90,000 in 2006.

Median bail amounts show the extent of the population affected by these increasing bail assignments. In 2006, the total population had a median bail amount of \$10,000 which means that at least half of felony defendants are assigned a minimum of \$10,000 in bail. The average bail amount nearly doubled between 1992 and 2006 from an amount of \$25,400 to \$55,500. Among people released, the average bail amount increased from \$7,800 in 1992 to \$17,100 in 2006. Of defendants remaining in jail or prison pretrial, 50 percent had a bail amount of \$40,000 or more in 2006. Since 2000, the median bail amount for those detained has been \$25,000, up from \$10,000 in 1992.

The proportion of felony cases assigned bail under \$5,000 decreased by nearly 15 percentage points from 1998 to 2006; and the percent of cases with amounts from \$5,000 to \$24,999 has remained relatively stable.

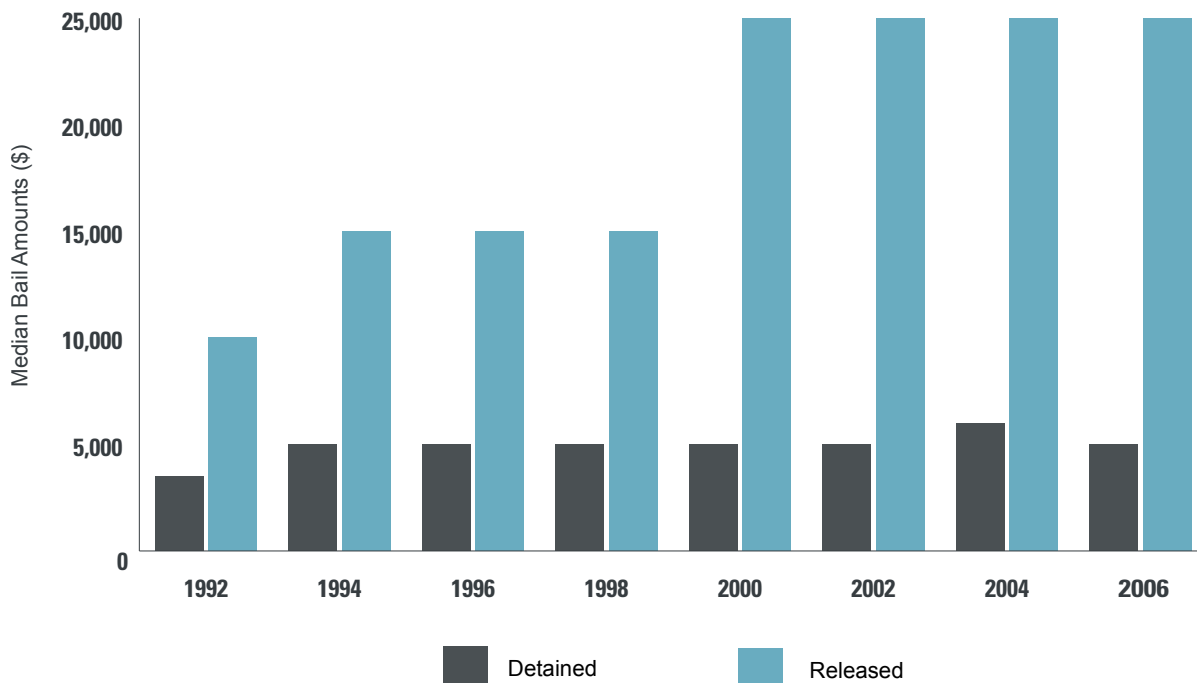
Meanwhile, more cases are receiving very high bail amounts. For example, in 1998, 25 percent of cases

Defendants released on nonfinancial bail prior to trial declined as those detained on financial bail increased.



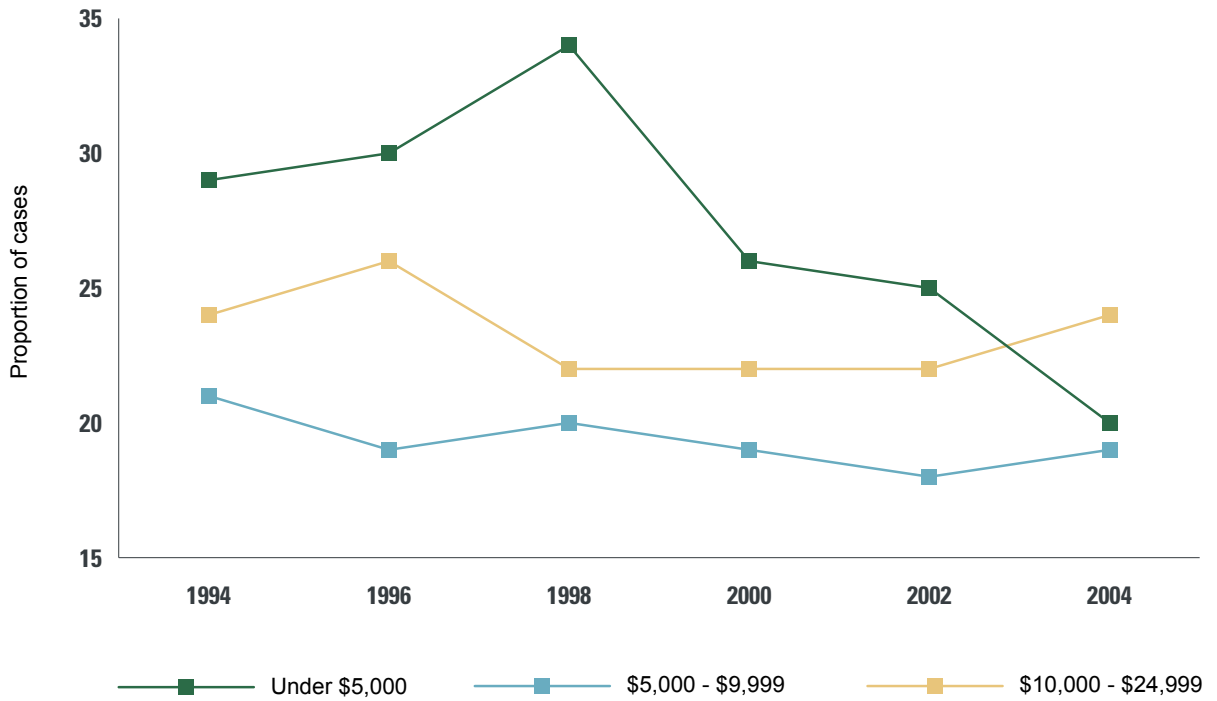
Source: State Court Processing Statistics data as retrieved from the Felony Defendants in Large Urban Counties reports, 1992 – 2006.

Between 1992 and 2006, the median bail amount for those detained increased by \$15,000.



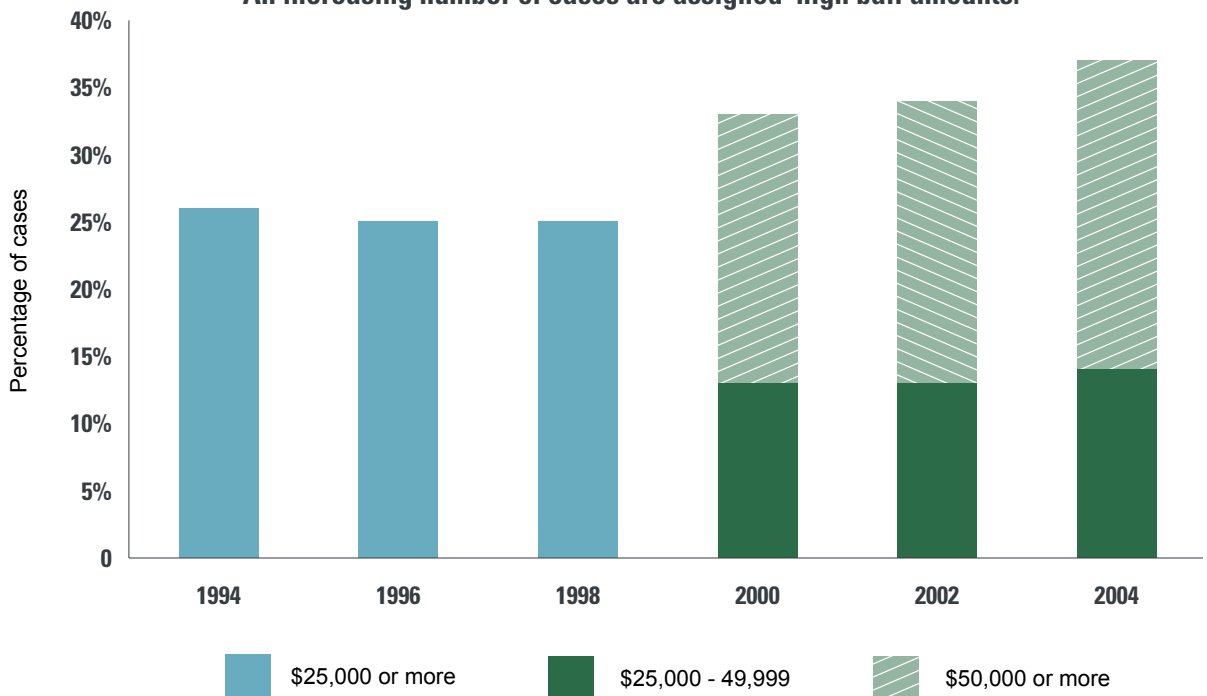
Source: State Court Processing Statistics data as retrieved from the Felony Defendants in Large Urban Counties reports, 1992 – 2006.

Cases with bail amounts under \$5,000 have dropped since 1998.



Source: State Court Processing Statistics data as retrieved from the Felony Defendants in Large Urban Counties reports, 1992 – 2006.

An increasing number of cases are assigned high bail amounts.



Source: State Court Processing Statistics data as retrieved from the Felony Defendants in Large Urban Counties reports, 1992 – 2006.

were assigned a bail amount of \$25,000 or more; yet, in 2004, 23 percent received a bail amount of \$50,000 or more. These increasing bail amounts suggest that bail inflation has occurred along with an increase in the use of surety bonds involving the for-profit bail bonding industry. This means that the amount of money that bondmen can collect has increased along with the rise in money bail amounts. Overall, whereas 25 percent had a bail amount of \$25,000 or more in 1998, this number increased to 37 percent by 2004.

Not only do high bail amounts pose a threat to constitutional rights to liberty pretrial, but they are believed to put low income populations at a disadvantage when facing plea bargains:¹¹ people may feel pressured to plead guilty as remaining in jail has such significant negative consequences, such as losing a job or not being available to take care of a dependent.

Whereas the Bail Reform Act mandates that people be released to the “least restrictive” conditions that will also assure appearance at trial and the safety of the community, many are not able to access those least restrictive conditions due to an inability to pay bail. The role of finances in this equation not only violates the mandates of the Bail Reform Act but also is believed to violate the Equal Protection Clause.¹²

THE USE OF MONEY IN THE PRETRIAL PROCESS DISPROPORTIONATELY IMPACTS VULNERABLE COMMUNITIES.

Many studies have shown over the years that people held in jail pretrial end up with worse trial outcomes than people who are free while awaiting trial. Those held pretrial are more likely to be convicted of a felony,¹³ receive a sentence of incarceration, and be sentenced longer than those released

pretrial.¹⁴ The use of money bail puts people without expendable income at risk of suffering the adverse impacts of detention in their cases.

People who are able to put together enough money to post bail or pay a bail bondsman’s fee may deplete their funds and the funds of families and friends that is needed to pay rent, buy groceries, and cover other bills.¹⁵ People who are unable to pay their money bail (or a bond for a portion of the bail) and remain in jail may lose their jobs, default on vehicles, lose their homes, get behind on child support payments, lose custody of dependent children, and more. The implications can make or break a person’s ability to resume life after their case is resolved.

“The requirement that virtually every defendant must post [money] bail... imposes personal hardship on them, their families, and on the public which must bear the cost of their detention and frequently support their dependants on welfare.”

—American Bar Association, *Standards Relating to Pretrial Release, 1968*¹⁶

For all intents and purposes, those held in jail are set up to fail, even if they are innocent of the charge. When held in jail, a person is not able dress as presentably as one who is able to come from their own home dressed and prepared.¹⁷ Jurors who see defendants in jail uniforms and shackles may be biased as being in jail is equated to dangerousness and guilt.¹⁸ They are not able to work with their counsel to prepare their defense, gather witnesses, and other activities needed to present a strong case due to limited phone use, obligations to work long shifts in jail programs,¹⁹ placement in jails long distances away from their counsel,²⁰ and other reasons.

People held in jail pretrial may lose their job due to absence;²¹ and if they are self-employed, pretrial

detention effectively shuts their business down. Not only does the lack of income impact the individual, their family, and their communities, but the collective amount of lost income due to pretrial detention can amount to millions of dollars and impact a country's economy. A number of studies have shown the loss of income in other countries due to pretrial detention: In Mexico, \$100 million dollars of income was lost to pretrial detention in 2006.²² In Argentina, over \$10 million dollars of income is lost to pretrial detention each year.²³ Similar information about income loss in the U.S. are not available, but considering that thousands of people are held pretrial throughout the year, the loss of income is likely to be significant.

Pretrial detention causes some people to lose their home, apartment, or spot in a shelter.²⁴ They may suffer a disruption in their medical care as provided by Medicaid and may even lose their health insurance due to being in jail.²⁵ Their families are often adversely impacted, as their children may have to move to another parent or relative's home, suffering disruptions in their education and home life, as well as the trauma of having an incarcerated parent.²⁶

In addition to the use of money bail, people with financial resources are currently able to pay "for extensive conditions of release" that would otherwise not be permissible.²⁷ One commentator noted the expensive conditions for pretrial release that Bernard Madoff and Marc Dreier were able to pay for in order to avoid pretrial detention for charges of financial "white collar" crime. In addition to being able to post a bond for their bail, they paid for security, video monitoring, and other restrictions in order to remain in their homes and attend to business while awaiting trial. In addition to the use of money to pay bail, this expanded use of money to pay for conditional requirements widens the gap between defendants who have money and those who do not. The ability to maintain one's job, housing, caregiver responsibilities, and other

matters should be available to all people awaiting their court date, keeping within the parameters of safety but not requiring they have financial resources to do so.

"The argument that Madoff and Dreier had a fundamental right to the extensive conditions they received ignores the fact that such conditions are unavailable and unrealistic for the broader population. Rather, these extensive conditions represent special privilege, and there is no fundamental right to pay for preferential treatment in the criminal justice system."

—Jonathan Zweig, *Harvard Journal on Legislation*²⁸

The question of whether money bail leads to violations of the Equal Protection Clause of the Fourteenth Amendment has been raised. The Equal Protection Clause provides that laws are to be carried out in a way that does not differ between people in similar situations.²⁹ Accordingly, a number of court decisions have agreed that a person should not be incarcerated on the basis of wealth, but all should have equal treatment and constitutional access to their fundamental rights under the law without regard to their financial status. However, the use of money bail with populations that do not have access to financial resources results in very different treatment compared to those who can afford to post a bond. Although an upper middle class person and a low-income person may be arrested and charged with the same offense, the upper middle class person

The average bail amount for detained people has increased from \$39,800 in 1992 to **\$89,900** IN 2006.

is much more likely to be able to post a bond and might even be able to secure a release on the same day. Meanwhile, the low-income person remains in jail because he cannot pay a bond—regardless of the fact that the offense charge was exactly the same as his released counterpart’s and regardless of his presumed innocence.

Due to disparities in the pretrial process, African American and Latino populations are more impacted by the use of money bail.

Approximately 11.8 million people were processed through jails during 2011; the total jailed population at a single point in time (midyear) was 736,000 people.³⁰ Annual jail populations show that a higher number of white people are in jail; however, considering that the black population only comprises 13 percent of the total U.S. population, it is disturbing that they comprised 38 percent of the U.S. jail population in 2012. Estimates show that the rate of Black/African American people being detained in jail was nearly 5 times higher than white and 3 times higher than Hispanic people.³¹

Disparities in jail populations have persisted despite years of studies on race and pretrial decisions. Since being jailed while awaiting trial has a direct impact on case outcomes such as conviction rates

and sentencing decisions, racial disparities in the pretrial process have a ripple effect throughout the justice system. The U.S. Supreme Court has affirmed the pretrial process as “perhaps the most critical period of the proceedings”,³² so the impact of race on decisions during this time is of particular importance. Previous studies have shown differing results when trying to find a direct relationship between race and pretrial decisions. However, a recent study looked at how race affects extralegal factors, such as education and financial support, which then affect legal factors, such as prior record and severity of charge. Together these factors influence pretrial decisions and outcomes. The study revealed correlations between race and all pretrial outcomes analyzed, concluding that “each correlation indicated harsher treatment for African Americans.”³³ The results showed that:

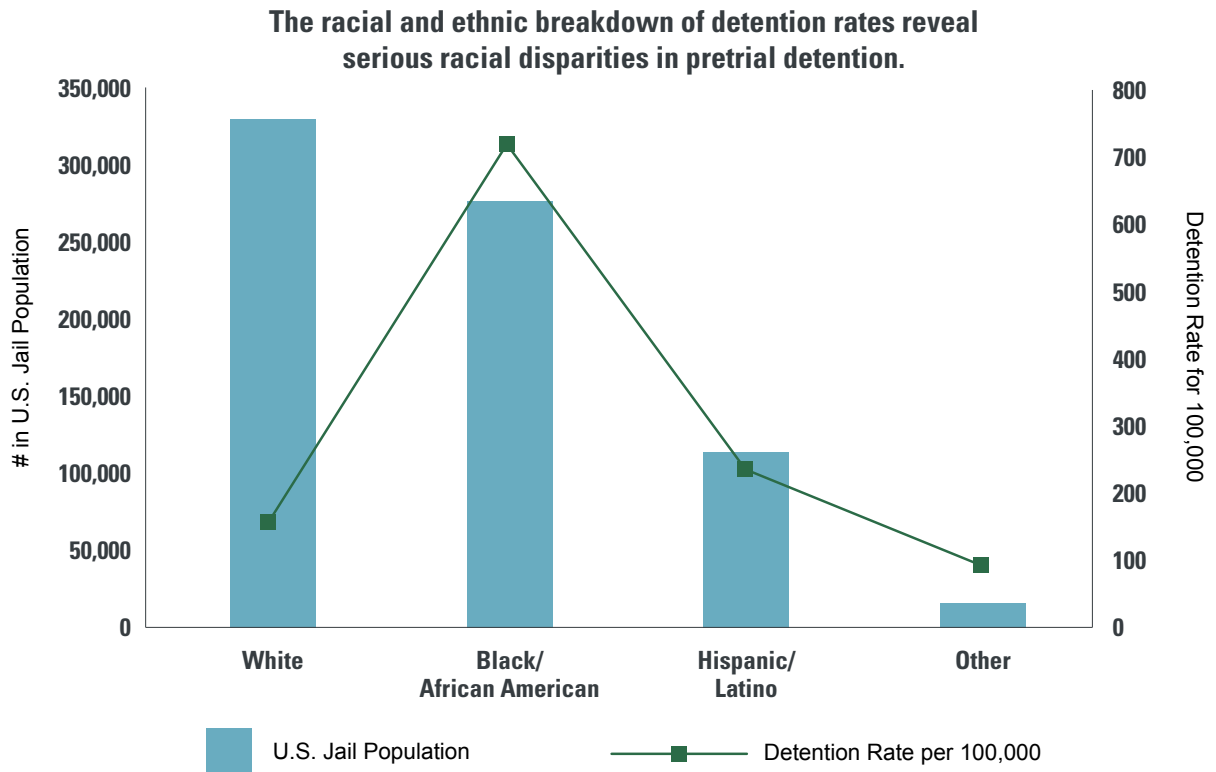
- African Americans were less likely to be released on their own recognizance than white defendants.³⁴
- African Americans ages 18 through 29 received significantly higher bail amounts than all other types of defendants.³⁵

Although the study did not show “race” directly predicting pretrial decisions, the relationship or “interaction” between race and other factors, such as age, gender, and socioeconomic status, was what

directly impacted pretrial decisions.

For example, although a judicial officer may not give a high bail amount specifically because of a defendant’s race, the person may have had difficulty getting a job due to his race, and thus, was rated as a higher flight risk due to an unstable source of income. Awareness of how this may happen at the bail setting stage is crucial for reducing disparities due to pretrial decisions, particularly as there is little oversight





Sources: Karen R. Humes, and others, "Overview of Race and Hispanic Origin: 2010," 2010 Census Briefs, 2011, Table 1; Todd Minton, "Jail Inmates at Midyear 2011 – Statistical Tables," 2012, Table 6.

of decision making processes at this phase. In most jurisdictions, people do not have legal representation at the time their bail is first set. Without understanding how race and extralegal factors impact the pretrial process, the effect of race on other circumstances and life factors will continue to be used to "reinforce stereotypes of more dangerous offenders in the minds of judges."³⁶

"...the disparity in bond amounts occurring at a less visible stage of case processing translate indirectly into racial disparities in imprisonment due to the relatively strong effect of bond amounts on...prison sentences..."

—John Wooldredge³⁷

Although judges and judicial officers may deny or simply not be aware of any racial bias in pretrial decisions, there is strong evidence that these bail decision makers consider the lost freedom caused by pretrial detention to be a greater loss for whites than for blacks. By creating a predictive model that considered details of the charges, the people charged, and other variables, researchers estimated what the bail decisions should have been for defendants and compared them with what the decisions actually were. They then estimated the cost of loss of freedom and other consequences of detainment in jail pretrial such as loss of employment, etc. Their calculations suggest that judicial officials valued the loss of freedom for blacks less; in essence, whites' freedom was valued to be worth more by about 60 to 80 dollars per day.³⁸

PART 4

MONEY BAIL EFFECTS ON THE JUDICIAL PROCESS

The use of money bail as a standard practice keeps many people in detention when, in reality, they could be safely released while waiting for their case to be resolved.

MONEY BAIL KEEPS PEOPLE IN JAIL WHEN THEY OTHERWISE COULD SAFELY REMAIN IN THE COMMUNITY WHILE AWAITING TRIAL.

A study using the State Court Processing Statistics found that in many of the largest U.S. jurisdictions, around half of those kept in jail would have been less likely to be rearrested than those who had been released.³⁹ The study also suggested that with proper screening mechanisms, an additional 25 percent of people could be released pretrial without increasing offenses or failures to appear.⁴⁰ However, as many jurisdictions do not have adequate screening or pretrial monitoring programs in place, judicial officials continue to rely on money bail as a release option.

Data are inconsistent on how many people are jailed because they cannot afford to post the bail amount or even acquire the services of a for-profit bondsman. Tracking bail amounts would reveal the

extensive use of money bail in a jurisdiction and point to ways to effectively reduce jail populations; however, not all jurisdictions track bail amounts. For example, a recent study on the Los Angeles County Jail revealed that bail amounts in Los Angeles were overwritten with “zero” once a defendant posted bail.⁴¹ This made it difficult to assess and make recommendations on how the county was using bail schedules and other pretrial service options to manage the number of people held on bail while awaiting trial.

Case Study: Baltimore, Maryland

One detention center that does track bail amounts is the Baltimore City Jail in Baltimore, Maryland. It is one of the 20 largest jails in the U.S. and one of the few local jails run by the state correctional agency, and has a higher than average percentage of its population—90 percent—on pretrial status.⁴² A snapshot of data showed that about 1 out of every 14 people in pretrial detention were held on a total bail amount of \$5,000 or less on February 13, 2012. This means that some individuals may have been detained because they were unable to pay the full bail amount or a bail bond of \$500—the typical

10 percent fee charged by bail bondsmen to post the bail. On February 13, 2012, sixty-two people were held on a bail amount adding up to \$1,000 or less and 19 people were held on a bail amount of \$100-250.⁴³ These 62 people were charged with offenses like trespassing, theft, driving on a suspended license, prostitution, failure to pay child support, minor drug charges and technical violations of probation. People who remain incarcerated on these low bail offenses usually do not have the small amount of money necessary to secure their release. Considering the financial burden of simply detaining someone in a jail even for 24 hours, it is likely that in these cases with very low bail amounts, a release option other than money bail would be a better use of public dollars. A person who remains in detainment due to homelessness, a substance abuse issue, or a mental health disorder should be diverted to other programs for more cost effective services.

In Baltimore, court dates ran an average of 30 days after arrest; however, some court dates may be set as long as 120 days after arrest. Those who remain in jail while awaiting trial because of their bail amounts drive up the average length of stay. Consequently, the average length of stay in the Baltimore City Jail in 2010 was 38 days.⁴⁴

The immediate financial impact of unnecessary pretrial detention along with the later social costs to society due to loss of employment, housing, transportation, child support, and other resources provide an impetus for utilizing other means to ensuring a defendant's presence at his or her court hearing. This is particularly important for those with nonviolent charges being held in lower security settings. In Baltimore City in 2010, 27% of the jail population was held in low security while 57% was held in medium security settings.⁴⁵ If those



proportions are applied to the February 13, 2012, jail population, 973 people were classified as low security while 2,055 people were held with a medium security classification.

On February 13, 2012, 62 people were in the Baltimore City Jail on bail amounts of \$1,000 or less.

Total bail amount*	# of people in jail
\$100-250	19
\$251-500	21
\$501-1,000	22
\$1,001-2,500	47
\$2,501-5,000	123
\$5,001-7,500	49
\$7,501-10,000	71
\$10,001-25,000	190
\$25,001-50,000	173
\$50,001-75,000	62
\$75,001-100,000	82
\$100,001-1,000,000	281
\$1,000,001 +	4
No Bail	1,806
Detainer**	243
Total number of people held pretrial	3,193
Sentenced Inmates	412
Total number of people in jail	3,605

*Total bail amount may include multiple bails for that one person. People who have multiple charges, one of which has a NO BAIL set, will be included in the NO BAIL number, not the other bail amounts.

**Detainers are when a person is being held by another jurisdiction or agency. People who were being held pretrial and had detainers were included in the Detainer total not under individual bail amounts, but were included in the sentenced category if they were already sentenced.

Source: Jail Daily Extract, February 13, 2012

Research shows that

25%
more people
could be released
pretrial without
increasing offenses or
failures to appear.

Case Study: Virginia

An analysis of people in detention who were investigated through Virginia's Pretrial Services agencies, using the Virginia Pretrial Risk Assessment Instrument, showed a considerable need for

reducing low-risk populations held in jail on low bond amounts. This study revealed that 15 percent of the 528 defendants had a bond set but remained in jail. Over three-quarters of the defendants were held on a bond amount up to \$5,000. Eighty-nine people (17 percent) had a bond amount up to \$1,000. Over 40 percent were classified as low to average risk on their risk assessments. Comparisons of bail amounts revealed that defendants with a "Below Average" risk rating had the highest bond amount average at \$6,975.⁴⁶

for 51 percent of all those booked during that time span.⁴⁷ In determining bail, California judicial officials rely heavily on bail schedules, which are lists of bail amounts preset for each offense. This is for a variety of reasons, including providing "cover" to judicial officials when facts necessary to make an independent bail decision are not available at the time of the hearing.⁴⁸ Some jail administrators, however, have refused to jail people with bail under a certain amount, on the rationale that they are generally low risk and will just increase overcrowding. To thwart this initiative, judicial officers have assigned even higher bail amounts than recommended in order to "force" a person to be jailed. One jail would not house those with a bail of \$25,000 or less for misdemeanor cases. People with misdemeanor charges that remained in jail until their hearing spent an average of 8.23 days in jail until disposition; those with felony charges spent an average of 53.03 days in jail until disposition.⁴⁹

The use of money bail results in thousands of people being held pretrial, and eventually increases the likelihood that more people will be incarcerated to serve sentences as well. This is not a necessary

In Virginia, 77% of the pretrial population was held on a bail amount up to \$5,000.

Classification	# (%)	Average Bail Amounts
Low risk	40 (8%)	\$2,903
Below Average	81 (15%)	\$6,975
Average	97 (18%)	\$4,010
Above Average	105 (20%)	\$5,528
High Risk	160 (31%)	\$6,914

Source: Virginia Community Criminal Justice Association, "October Study," 2012.

Case Study: California

Although bail amounts are not tracked, a study of Los Angeles County Jail showed that in 2007-2008, about 200,000 people were held in jail from arrest through disposition of their case. This accounted

evil, as alternative solutions are available and have worked in providing safe communities and functional pretrial justice for decades. A few snapshots of work being done in some states provide an idea of the magnitude of savings possible:

TRAVON ALSTON

COMMUNITY MEMBER



I wound up getting caught in an incident with three friends. A fight broke out, someone got shot, and I got arrested for it. The charges were attempted murder and first degree assault.

That was my first time being charged as an adult. I was 18. My bail was set at \$250,000—cash bond. I couldn't pay. No one in my family could pay that. I knew I was sitting. I cried the first night. It was rough, you know, that first experience. I'd heard so many stories about it, about people getting raped. It wasn't like that, but it was rough. It wasn't like your mother could come get you; you were there to stay. It was hard, especially the city jail because in the summer, it's extremely hot. The walls sweat. You're not living to your needs; you're living with what somebody else tells you to do. You're in the cell with another guy who's just chaotic, so it's a psychological game at the same time. I was stabbed and all. It was a bad experience. I'd been in street fights before—clean fights—but it's a whole other world in jail. It's animalistic. It takes a strong mind, a strong will, to deal with jail, but at the end of the day, I kept my faith. I knew I wasn't guilty, so I did a lot of praying.

I was in city jail for nine and a half months. Then, one day, I got a bail reduction. They took my bail from \$250,000 to \$75,000 cash, so my family bailed me out. I wound up going to court about a month later and I beat the charges. The guy who was shot altered his statement and signed an affidavit where he told the truth, that I didn't shoot him. The guy who said he saw me shoot him changed his statement, too. He said that he said I did it because he'd committed a crime and he was trying to protect himself; the police said they'd cut him a break if he gave them some information. In the end, they both got locked up for murder. When I came home in 2001, I had ambition. My ambition was to start working and definitely go back to school and get my diploma because you can't get no diploma in prison; at that time, they wouldn't let you. I was in city jail, not prison, so there was no school. That was the foremost thing. I wrote to the school board, then I enrolled and wound up going to the Houghton Institute. I graduated and obtained my high school diploma, so that was a plus. Then I started working.



- In California, at the end of the first quarter in 2012, 47,155 people in county jails were not convicted and are waiting for their trial date. This represented 64 percent of the total jail population.⁵⁰ These people were held at an estimated \$100 per day while pretrial programs could have provided supervision at \$2.50 per person each day.⁵¹
- A Florida State University study reported that pretrial release supervision in selected Florida counties cost \$1.48/day per person, and detention cost \$107.71/day simply for housing. Preventing just 50 percent of the jail population from ever going into jail (through pretrial diversion or pretrial services) would have resulted in a cost savings of over \$210 million in 2010.⁵²
- An evaluation of a pretrial service program in Iowa showed increased safety and court appearance along with reduced technical violations of pretrial release conditions. While detention cost \$19,253, release to pretrial services cost \$3,860 resulting in a savings of \$15,393 per person released. The total cost savings due to pretrial services from 2008 to 2009 was \$5.3 million.⁵³

MONEY BAIL DOES NOT INCREASE COMMUNITY SAFETY.

The Bail Reform Act of 1984 provided that courts may make considerations for the safety of the community in bail decisions. Although a person in the pretrial process may or may not be one who committed the offense, there are still a number of precautions that should be taken into consideration to ensure no further harm is done. The judicial system predominately depends on money bail to ensure safety and appearance at court on the premise that putting up a money bond will incentivize people to return to court. However there is no empirical

evidence to support this idea. And, while a judge may have reason to detain a person out of concern for community safety and thus set a high bail amount, the defendant still may be able to raise the money needed to pay his bond. Or, a for-profit bail bondsman may recognize that a 10 percent fee off a high bail amount will result in a hefty profit and decide to take a risk in releasing the defendant in order to continue to his business.

From the perspective of people who are victims of crime, even large bail amounts provide no reassurance that the person charged will be kept from harming others. People who are victims of crimes and their advocates provide a unique perspective in what an ideal pretrial process would look like, as many of them are seeking true justice to be done regarding the harm caused to them. Many are also concerned with preventing similar offenses from occurring in the future either to themselves or others. While other parties are motivated in their work by a desire to reduce caseloads, increase financial gain, or other procedural concerns, victims can help shape policies that will optimize safety in the community. From this perspective, a few considerations are offered from Dr. Will Marling at the National Organization for Victim Assistance:⁵⁴

- Victims have real concerns pretrial. These concerns revolve around their physical, emotional and financial safety. Although risk assessments and pretrial services are probably going to reduce harm more so than simply releasing a defendant on a cash bond, the pretrial process should be thorough to ensure the safety of victims by taking their concerns into account for release decisions.
- The use of money bail can actually perpetuate the impact of the offense, especially financial offenses, where money has been taken from the victim. The use of that money to pay a cash bond or surety bond fee can further exacerbate

the effects of that offense and make it more difficult for the victim to regain what is rightfully his.

As stated above, money bail is widely believed to incentivize a person's return to court; however, despite the use of money bail at increasingly higher amounts, failure to appear rates have not changed substantially. Whereas in the 1960s and '70s, the failure to appear rate among the most populous cities was 6-9 percent⁵⁵, the failure to appear rate for felony cases was at 22 percent in 2006.⁵⁶ Failing to appear for court causes increased workloads for court staff, issuance of arrest warrants, incarceration on minor offenses for people who are non-compliant and longer jail stays in connection with the present offense or future offenses. Failure to appear on misdemeanor cases also results in the loss of revenues from unpaid fines and fees.

Data from 2006 on felony defendants of the 75 most populous counties showed that about 12 percent were on pretrial release. This includes people released after posting a money bond or a surety bond through a for-profit bail bondsman. Many pretrial service agencies have implemented programs showing very high rates of success in lowering re-arrest of individuals awaiting trial and, if further expanded in the 75 most populous counties, it is likely that the rate of people arrested while awaiting trial could be reduced substantially. For example, a program begun in Santa Cruz County, California, showed that 92 percent of defendants under supervision were not re-arrested for new offenses.

The use of money bail is arbitrary and not guided by the use of risk assessments or national standards.

A major barrier to understanding the extent and impact of money bail is that it is used differently in various states, counties, and cities. Each jurisdiction

has a measure of discretion in determining how money bail will be used in the criminal justice process. Consequently, each jurisdiction differs on how they determine what types of bail to set, how much money bail is set, and methods of allowable payment to secure one's release.

In an effort to standardize aspects of the bail process, some jurisdictions use "bail schedules" or "bond schedules" to determine money bail amounts as it relates to the alleged offense. These schedules may be legislatively mandated or used informally, and they are intended to standardize how much a bail is set regardless of the person's personal characteristics or demographics.⁵⁷ There is no official guideline for judges and officials who make up the schedules; consequently, even within a state, the amount of bail set for a charge may vary by county. Often, the bail set does not match the severity of the charge, with amounts greatly

"Ultimately, the justification for bail is to provide an incentive for a defendant to return to court to face trial by imposing a monetary penalty if he doesn't. In a bail bonds system, once the bondsman is paid, the defendant no longer has any incentive to return to court, because he will not be getting any money back if he shows up for court, unlike if he posted bail himself. So the justification for bail is undermined by the bail bonds system. No bail will ensure that a defendant won't commit another crime while waiting for trial, and that, to me, is the crux of the decision of whether or not to release a defendant. Is it a public safety risk to release this individual? The overall amount of bail is irrelevant to this decision. It is only relevant to the decision as to how much incentive this defendant needs to return for trial."

—PAGE CROYDER, FORMER BALTIMORE CITY PROSECUTOR

exceeding the potential cost of damage or loss. The bail a person could potentially receive for a basic drug possession charge would vary across the states as follows:

- In California, an ACLU study found that 58 different bail schedules are in use across the state. For a drug possession charge, bail may vary by \$20,000 depending on the person's location. Recommended bail amounts for drug possession are \$5,000 for people in Fresno or Sacramento, \$10,000 in Los Angeles, and \$25,000 in San Bernardino.⁵⁸
- In Maryland, a bail schedule is not used and non-judicial court commissioners make bail decisions based on a number of different factors as required by legislation, including the nature/circumstance of the offense, person's prior record, community ties, a recommendation from the State Attorney's Office, if provided, and more.⁵⁹ Therefore, individuals charged in Maryland with drug possession likely will have different money bail amounts depending on the court commissioner who processed their case.
- In Washington, D.C., agencies depend on various non-financial release options instead of relying on money bail. Those with a drug possession charge would likely receive a conditional release that would potentially involve supervision, drug treatment, or some other requirement to encourage the defendant's return to court as well as to assure the safety of the community.

The use of bail schedules is problematic because there is no definitive association between a particular accusation and the amount of money that would guarantee appearance at court (or deter future criminal activity) for that offense. Hence, the bail amounts are arbitrary and guarantee neither safety in the community nor appearance in court.

Despite the unknowns around the effectiveness of bail schedules, they are still relied on heavily due to the general acceptance of money bail in the judicial system. A 2009 study of 112 of the most populous counties in the U.S. showed that 64 percent of the participating jurisdictions utilized a bail schedule when determining money bail amounts.⁶⁰

"Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance."

—U.S. Supreme Court Justice Jackson

Another concern for bail schedules is that, if they are required to be used, judicial discretion in the bail setting is limited. In 1951, the United States Supreme Court wrote in *Stack v. Boyle* that "the fixing of bail for any individual defendant must be based on standards relevant to the purpose of assuring the presence of that defendant."⁶¹ Additionally, by depending on bail schedules, the justice system plays into the hand of the for-profit bail bonding industry, which makes a percent profit depending on the amount of the bail set. Additionally, bail schedules may distract jurisdictions from the need to use valid risk assessments and release by other options than money bail, such as a conditional release that includes monitoring and supervision. As has been shown elsewhere in the criminal justice system, the seriousness of an offense (or alleged offense) is not on its own a proxy for risk for re-offense,⁶² or in the case of pretrial, failure to appear.

MONEY BAIL ALSO POSES ADVERSE RISKS TO THOSE WHO HAVE BEEN CHARGED WITH OFFENSES.

The liberty of people accused of offenses is at risk when money bail can be used to force a detention.

JUDICIAL OFFICIALS CAN USE MONEY BAIL TO FORCE A DETENTION WITHOUT A CONVICTION.

The 1984 Bail Reform Act provided that judicial officials could consider the safety of the community when setting bail. However, due to the Eighth Amendment which assures that bail should not be used excessively, many states have laws regulating the use of pretrial detention except when setting bail for capital offenses. As a result, many judicial officials who consider a person a threat to the community may circumvent laws against pretrial detention and instead assign a very high money bail that they believe a defendant will not be able to pay. This means that despite the laws regulating detention of individuals prior to conviction, bail can now be used as a way to keep a person from being able to leave jail. This coercive way of keeping people in “preventive detention” not only violates rights to liberty, but it also does not guarantee safety. The way that preventive detention is currently administered in many jurisdictions, i.e., without a valid risk assessment or other standardized way of processing people accused of offenses, is not proven to be effective nor grounded on a solid theoretical basis.⁶³ However, little research has been done to measure the impact of preventive detention that is conducted in a standardized, meaningful way, including objective assessments, consideration of less restrictive options, and more, that could keep people who might cause further harm in detention without depending on financial means to keep them there.

PEOPLE WITHOUT ACCESS TO COUNSEL AT BAIL SETTINGS MAY RECEIVE HIGH BAIL AMOUNTS THAT RESULT IN THEIR DETENTION.

Since 1963, a number of court rulings provide for access to counsel at various stages prior to a criminal trial, including the following: custodial interrogations, initiation of adversarial process and without regard to involvement of the prosecutor, critical stages pretrial, including preliminary hearings, lineups at or after initiation of adversary judicial criminal proceedings, show-ups at or after initiation of adversary judicial criminal proceedings, arraignment, and plea negotiations.⁶⁴ Yet, the application of the Sixth Amendment, which assures the right to an attorney, is largely neglected as many jurisdictions “instead rely on their own sense as to when counsel should be appointed, if at all”.⁶⁵ As of 2011, only ten states and the District of Columbia provided for indigent access to counsel at initial appearance before a judicial official and ten states had no provisions for indigent defense at this stage in pretrial proceedings. The remaining 30 states provided indigent access to counsel that varied among different jurisdictions.⁶⁶ The concern with the rise

“If you get locked up for 100 pieces of crack, that doesn’t mean you are Pablo Escobar. If I’m walking around with 100 pieces of crack, that’s \$1,000. That means I’m a petty hustler. So if I got caught with \$1,000, why would you charge me \$250,000 to get out on bail? I might have put all my money there and then got locked up, so that’s all I have. How can I afford that if I only have \$1,000? You’re charging me \$249,000 more than I have.”

—TRAVON ALSTON, COMMUNITY MEMBER

in the use of money bail is that liberty is granted to those who can afford to pay bail or those who can pay a percentage to a bondsman, should they find a bondsman willing to take their case.

A primary barrier to ensuring access to counsel at the bail setting is that states and jurisdictions lack the financial resources to staff the number of public defenders needed at this stage.⁶⁷ Recent developments in the state of Maryland provide a good example of the challenges that may be encountered:

In Baltimore, Maryland, an 18-month pilot project where law students provided legal counsel at bail setting for 4,000 indigent or low-income defendants charged with nonviolent offenses showed positive benefits. The outcomes of this project revealed that representation by legal counsel led to 2.5 times more releases on recognizance when compared to defendants without representation. If money bail was used, legal representation led to bail amounts that were affordable for the defendant. Furthermore, legal counselors were able to provide judicial officers with information and clarifying details without putting people accused of offenses at risk of making incriminating remarks. Counselors were able to effectively advocate for the defendants' trustworthiness and ties to the community without putting his or her employment, loved ones, or housing in jeopardy⁶⁸ while increasing the number of defendants released on recognizance. Due to the project's impacts, researchers concluded that the lack of representation at the first bail setting was the leading reason for lengthy pretrial detention.⁶⁹

The Maryland Court of Appeals decided in January of 2012, in *Dewolf v. Richmond*, that public defenders should provide legal representation at the first bail setting. However, the public defender's office could not bear the burden of the additional 108,000 hearings added to their workload through this unfunded mandate.⁷⁰ Compliance would reportedly require an additional \$28 million for the Public Defenders'

Office and \$83 million for prosecutors across Maryland.⁷¹ Three months later in April, 2012, the ruling was amended to require legal representation only at the second bail hearing, if held, when an actual judge would review the first bail decision.

"Conservation of resources" now trumps constitutionally guaranteed court proceedings so much so that "each pretrial step will explicitly tolerate a modest amount of error".⁷² However, these errors lead to high bail amounts, unnecessary detention, and a costly pretrial system that communities cannot sustain.

In at least one state—the state of Oklahoma—the use of money bail can lead to people not being able to get legal representation for their case. Essentially, people of low income must choose between paying or getting help to pay for their money bond or getting a public defender. The statute currently on the books states that anyone who pays a money bond or gets someone to pay the money bond on their behalf (whether that be a for-profit bail bondman or family members) subsequently will not meet the criteria for "indigent" and thus will not be provided a defense attorney.⁷³

An inability to pay the money bail may coerce people to plead guilty so that they can get out of jail sooner despite being innocent.

People detained due to money bail are put under greater pressure to enter a plea bargain, which has become the *de facto* standard in resolving more than 95 percent of cases each year. Prosecutors are often overburdened with the expectations and demands of their position along with massive caseloads. Prosecutors can and often do ask judges for pretrial detention as leverage in plea-bargaining discussions with people of limited financial resources. People with children at home, a job or housing at stake, or a desire to avoid the hard conditions of jail could be and have been coerced into entering a guilty plea to avoid pretrial detention, particularly

if the time they have already spent will count toward the prospective sentence.⁷⁴ This not only fulfills the prosecutor's mission of closing another case with a "win", but it enables the criminal justice system to function. Should a greater number of people seek to maintain their innocence through a jury trial, the criminal justice system would not have the capacity to bear the case loads.⁷⁵ Obtaining quick plea bargains keeps the system moving; consequently, conviction rates may be high, but justice is not necessarily served.

"We see clients at arraignment not wanting to plea, saying they want to fight their case. Then they hear the bail that the prosecutor is going to ask for, and they'll turn to their defense lawyer and say, 'I'll take the plea.'"

—Robin Steinberg, *Bronx Defenders*.⁷⁶

Conviction rates for people charged with felonies stood at 68 percent in 2006 with 96 percent of those convictions a result of guilty pleas. Only 3 percent of those cases actually went to trial.⁷⁷ This high rate of guilty pleas is of concern because people often will plead guilty despite their innocence. A 2012 study suggested that in an effort to avoid the ominous maximum penalties of a potential conviction in an inherently coercive⁷⁸ and unfamiliar system, more than 50 percent of innocent defendants pled guilty to get a lower sentence rather than risk a conviction, albeit faulty, that would lead to the maximum penalty.⁷⁹ This means that in 2006, over 16,875 people could have been wrongly convicted.⁸⁰ Particularly in the face of mandatory minimum sentencing rules, people have a strong incentive to take a "lesser" deal from a prosecutor if they fear the defense (which may be an overburdened public defender) will not be able to prove their innocence.⁸¹

Plea bargains can greatly compromise the safety of communities. For every person that falsely pleads guilty, the person who truly committed the offense

remains unaccounted for in the community and has not been held responsible for his or her actions. The high faulty conviction rate also skews research that seeks to determine or predict which individuals may be at risk for committing future crimes or harming the community. Instead, researchers are just getting a good idea of which people are more likely to plead guilty regardless of their guilt or innocence.

The fact that first time defendants are convicted and sentenced more harshly than those with previous convictions⁸² affirms that there is a problem with this procedure of obtaining convictions. All of these examples show how pretrial detention is wielded to serve purposes other than assuring court appearance and safety of the community. This is an abuse of power that leads to wasteful use of taxpayer dollars, unfair treatment of individuals based on financial resources, and violations of constitutional rights.

However, many are in a position to recognize their power in reducing the burden on the criminal justice system by approaching prosecution with system outcomes in mind. For example, prosecutors in Kings County, New York, established a re-entry program to reduce the number of repeat offenders they encounter in their work. The emerging role of the "21st century prosecutor" is primarily to ensure public safety, which is expected to include safeguarding civil liberties, enhance capacity through community collaborations, ensure justice is served, and hold the public's trust.⁸³ Prosecutors who understand and support pretrial policies and practices that have been proven more effective than money bail will be doing their communities a tremendous service.

**ONLY
3%**
of felony and
misdemeanor cases
went to trial in 2006.

PART 5

EFFECTIVE ALTERNATIVES TO MONEY BAIL

There are alternatives to money bail that improve outcomes for people awaiting trial and the community. Public opinion shows support for diverting public resources into more effective strategies rather than simply locking up people unnecessarily.

A Pew Center on the States study showed that 84 percent of surveyed American voters believed that community-based programs could be better used instead of relying on incarceration for people convicted of low-level, nonviolent offenses.⁸⁴ A study of people in a large, Southern metropolitan area showed that 60 percent believed that writing a citation would be preferred over arresting a person for a low-level, nonviolent charge. They also supported the idea of releasing people to pretrial supervision over requiring a money bond or releasing on recognizance alone.⁸⁵ There are a number of strategies, many of which are highlighted below, that reduce the negative

impacts of money bail on low-income populations while safely decreasing the number people held in pretrial detention.

Valid risk assessments can provide risk-supported decision-making and eliminate the need for money bail.

Although the use of pretrial risk assessments is intuitive and has the foundation of more than 30 years of research, the practice of assessing risk in determining pretrial release and bail setting is not commonplace. Field experts estimate that only about 85 jurisdictions in the U.S. are using a validated risk assessment in their pretrial release determinations.⁸⁶ However, the use of valid risk assessments and release options other than money bail is crucial for reducing the number of people held in jail while awaiting their court date while assuring safety in the community. Risk assessments support the release of people who can safely remain in the community pretrial (with or without additional conditions), and provide insight



TYRIEL SIMMS

COMMUNITY MEMBER



It's not easy to stay out of trouble in Baltimore City. Even the best of us end up in trouble.

I have an extensive arrest history, but I do not have an extensive conviction rate. That's normal for living in Baltimore City. It's normal to be arrested for something that you didn't do, to be looked at as a problem. It's normal to be in the wrong place at the wrong time, which is everywhere. And it's normal for guys to accept convictions for things that they didn't do. People want to go home, and they can't afford proper representation. So they get the public defender. How does he represent you? You probably never met him until your court date. Probably didn't review your file until that morning. He doesn't know your name, and then you go to court, and he's asking you what you are going to do. You're saying, "I'm innocent. I'm fighting this to the end. I really didn't do this." And he's like, "This is the state's offer." I have broken the law, but I would say 80% of my arrest history has been for something I didn't do. Of course I took the pleas. By the time you go in front of this judge, he's had 20 cases of the same charge. How different do you look?

You'd be surprised what a zip code can do to you in court. 21230 is a profile zip code. "Where does he live? 21230? Get him out of here." And then you are taking a plea to get out of the city jail, which is the worst place ever to be.

The last time I was arrested, I was initially offered \$150,000 bail, and then the judge changed it to no bail because he was in a bad mood. He said that. They say whatever they want to say to us. The toughest guy, the most confident person, is broken down in front of these judges, because they have the power to use that pen. It's not a sword; it's a nuclear bomb. They could ruin your life at any time, and you have to put in the work time and money to get it back. You'll be surprised how many guys come home after doing 80 percent of a 25-year sentence in the law library trying to find out their innocence. You have to put all those years in just to prove that you're innocent. You have to prove that yourself.

A guy might need \$500 to get home, and he might not be able to afford that. And he might be innocent. If you are to give someone bail, some of the guidelines need to be changed. It might need to be based on your house or income or something of that sort. They have some pretrial opportunities that I have heard of. I think that they might be able to go home, for pretrial home detention. But, that standard is the highest. I've applied for it almost every time, and I have never gotten pretrial home detention. For some of the pettier charges, like simple possession charges, why wouldn't they be allowed to come home and be put in a work program? Or make them do some type of volunteer work. At least give them a step forward in some kind of way.



into the possible need to detain people who may pose a safety or flight risk. Few states have codified the use of risk assessments, but more are beginning to implement the use of these tools.

Risk assessments are tools that, when used properly, can provide a dependable prediction of whether a person will be involved in pretrial misconduct, whether by failure to appear in court or being a danger to the community. Typically in the form of an electronic or paper survey, risk assessments provide a way to make an objective assessment of the person being charged with an offense while minimizing any possible bias on the part of the interviewer. The assessment findings provide a classification, usually “low risk”, “moderate risk”, or “high risk,” which aid in determining the most appropriate form of bail and pretrial supervision.⁸⁷

Opinions research shows that the general U.S. population not only supports the use of risk assessments in bail determinations but also believes that risk assessments are routinely used. The public expects that such a practical tool would be used in determining bail.⁸⁸

The reluctance to implement risk assessments broadly may stem from an incomplete understanding of their proper role and use. Some professionals in the field express concern that risk assessments may not account for the individual case characteristics that they believe will affect pretrial outcomes. However, years of risk assessment studies have confirmed a number of factors that consistently predict pretrial misconduct across a variety of charge types and localities. This means that the risk assessments which are validated, meaning tested for accuracy for each jurisdiction, can provide reliable information for pretrial decisions. This information can be used to increase objectivity in the pretrial decision-making process and serve as a tool to move away from financial bail in favor of appropriate pretrial supervision.



PAGE CROYDER,
Case Manager at Baltimore
Outreach Services; Former
Baltimore City Prosecutor

To me, the harder cases are the non-violent cases.

If you have a guy going into McDonald’s with a gun and robbing people, I’d be hard-pressed to say that person should be released pending trial. And yet those people are given bails. For non-violent crimes, we could make greater use of home detention enforced with electronic monitoring, daily reporting to somebody, and so forth. Instead of setting a bail, maybe the alternative is, you’re confined to your house and you have to wear this bracelet. That’s much better than locking somebody up.

The really hard decisions are not in the bail amounts, but in who is what kind of risk. As a system, we have almost stopped thinking about that, when it should be the first focus of bail reform.

Several states are using validated risk assessments or are conducting the research needed to have the appropriate tool in place. Although several factors are consistently valid across different localities, it is still important that each state evaluate its risk assessment to ensure each factor is accurately predicting pretrial conduct within the parameters of that state’s laws and environment.

VIRGINIA: Development of the Virginia Pretrial Risk Assessment Instrument (VPRAI) began in 1998 and by 2005, the state had implemented it in all pretrial service agencies. In 2007, a validation study was conducted on the tool showing that it appropriately categorized people charged with offenses by risk level and accurately predicted pretrial behavior. Additionally, this study revealed that measuring “outstanding warrants” did not improve the accuracy of the tool so the list of factors assessed was reduced to the following: primary charge type,

THE BAIL REFORM ACT OF 1966 PROVIDED 9 CRITERIA TO BE INCLUDED IN PRETRIAL RISK ASSESSMENTS:

1. Nature and circumstance of the offense
2. Weight of evidence
3. Family ties
4. Employment
5. Financial resources
6. Character and mental condition
7. Length of time at current residence
8. Record of convictions
9. Appearance record at court proceedings

Barry Mahoney, and others, "Pretrial Services Programs: Responsibilities and Potential," National Institute of Justice: Issue and Practices, March 2001

RISK ASSESSMENT FACTORS VALIDATED BY MULTIPLE STUDIES:

1. Prior failure-to-appear
2. Prior convictions
3. Present charge a felony
4. Being unemployed
5. History of drug abuse
6. Having a pending case

OTHER FACTORS SUPPORTED BY RESEARCH:

1. Active community supervision at time of arrest
2. History of violence
3. Residence stability
4. Community ties
5. Caregiver responsibilities

Cynthia Mamalian, "State of the Science of Pretrial Risk Assessment," Pretrial Justice Institute, March 2011; Marie VanNostrand and Kenneth Rose, "Pretrial Risk Assessment in Virginia: The Virginia Pretrial Risk Assessment Instrument," May 2009.

pending charge(s), criminal history, two or more failures to appear, two or more violent convictions, length at current residence, employed/primary caregiver, and history of drug abuse.

FLORIDA: In 2011, six counties participated in the validation of a pretrial risk assessment tool based on the Virginia Pretrial Risk Assessment Instrument. This study showed positive results in categorizing defendants appropriately for pretrial release. The success rate (defined by court appearance and no re-arrest for new charges) was at 87%. The results showed that this tool is likely to be effective in other counties in Florida and efforts to broaden implementation are underway.

KENTUCKY: Since 1976, it has been illegal to post a bond for profit on behalf of a defendant in Kentucky.⁸⁹ In 2009, the state of Kentucky validated an instrument that had been in use for years. This tool was edited to include only the most predictive factors resulting in a twelve item Yes/No checklist with weighted questions allowing a simple capture of information indicative of a person's behavior on release while awaiting trial.

Risk assessments should be conducted as soon as possible after arrest to capture the most accurate information.⁹⁰ They also show that conditions for release must be carefully applied, particularly to low-risk populations. (More on this is provided in the Conditional Release paragraph below.) Risk assessments that are pages in length and/or require lengthy training or certification to be used will not be a practical solution for pretrial assessment needs in most areas. Some jurisdictions also utilize risk assessments developed for predicting behavior of a person leaving prison on probation or parole. It is important to recognize the differences in the situations and populations being assessed and understand that risk assessments intended for re-entry will not predict with the same accuracy the behavior of those awaiting trial.

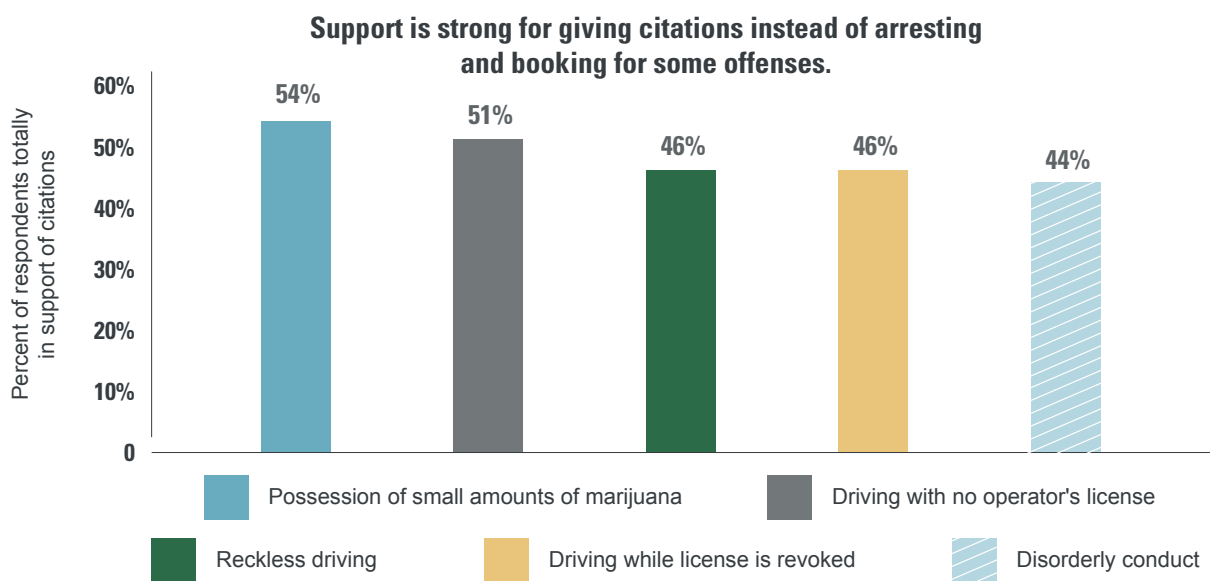
The use of citations instead of arresting and transporting individuals to be booked at a facility can provide a cost-savings to the community.

The use of citations has been recommended since the 1920's to reduce arrests and subsequent dependence on bail bondsmen. Current models using citations include a risk assessment component (either completed by the police officer or a pretrial services agency), which allows officers to confirm that the individual would be an appropriate candidate for a citation versus going through the booking process at a jail. Technology allowing for fingerprinting and positive identification of people charged is now available to assist law enforcement officers in this practice. At this time, the state of Kentucky has codified the use of citations and is currently in the process of releasing their evaluation findings for this intervention. Other jurisdictions that have begun to increase the use of citations include Maryland and the District of Columbia. A 2012 survey found public support for citations in lieu of arrest for various types of offenses as seen in the following graph:⁹¹

Many people can be safely released in the community on their own recognizance while awaiting trial.

Risk assessment studies show that those rated low-risk generally complete the pretrial process successfully by attending their hearings and not having any incidence of re-arrest. They also are more likely to complete the pretrial process successfully by not having additional court-ordered expectations placed on them⁹² as they are already attending to other responsibilities. This means there is a large proportion of people accused of offenses that can be released on their own recognizance and trusted to comply with pretrial requirements of attending court and avoiding re-arrest.

People rating higher on the risk assessments generally are not as likely to be released on recognizance and usually are left with the only option of posting a money bail (either by posting their own cash or acquiring the services of a for-profit bondsman). However, the irony is that those who have no financial support rate higher on the risk assessment and, hence, are more likely to be required to post a money bond in order to be released pretrial.



One study revealed that those with financial support were almost two times more likely to be released on recognizance and having a high school degree provided a greater chance of being released on recognizance.⁹³

One of the negative pretrial outcomes that judicial officers are trying to avoid is failure to appear in court as this disrupts already overbooked court schedules. However, many missed court appearances are not due to flight but simple interruptions to life. Common reasons given for missing a hearing include forgetfulness, oversleeping, starting a new job, being told the wrong court room, and needing to take a family member to the doctor.⁹⁴ Recognizing these issues may help lessen the severity of a missed court appearance and encourage the use of this cost-effective release mechanism.

Conditional release can expand the pool of people who may be safely released while awaiting trial.

When used in conjunction with a valid risk assessment, judicial officers may safely release some people with conditions that will ensure return to court and safety in the community. Common conditions used by judicial officers include alcohol and/or drug testing, holding or getting a job, working towards a diploma or degree, curfews, no contact with victims and/or witnesses,⁹⁵ and remaining under the supervision of a family member, community service organization, or pretrial services agency. However, judicial officers should take precautions to match the conditions with the level of risk determined by the risk assessment. Placing inappropriate or unnecessary conditions on people with low risk ratings, such as drug testing or additional supervision, results in higher failure rates.⁹⁶ It is recommended that minimal conditions be placed on people who pose less risk and

are already attending to other responsibilities. Conditions are generally more useful for people who score at high risk on their risk assessment; however, judicial officers should also take care to place requirements that match the needs of the person accused of the offense.⁹⁷ For example, an individual without substance abuse problems or a history of substance abuse may not need to be required to undergo alcohol testing; adding such an unneeded condition could cause an unnecessary technical violation should the defendant forget to show up for a screening.

The voice of the victim advocates community should be included when formulating conditions to ensure that no further harm is done. Particularly in cases of domestic violence, the intimate partner/spouse may provide a perspective that is not intuitive but safer if a person charged with domestic violence is released. For example, defendants in domestic violence cases are often released on the condition of no contact; however, at times, a no-contact order may exacerbate the situation. There may be times where a victim would rather have the accused person in the household, resuming a level of responsibility, rather than outside the home and cut off from all communication. At times, a victim may feel safer to have the lines of communication open. These types of considerations may not be obvious to someone who has not experienced domestic violence or worked with victims of violence, so it is important that victims and victim advocates have a role in the pretrial release decision-making process.⁹⁸

Effective pretrial service agencies can provide the risk assessment and supervision needed to monitor defendants as needed prior to their court date.

Pretrial service agencies have a demonstrated record of reducing pretrial jail populations, assuring

appearance at court, and maintaining safe behavior among their clients. This is accomplished by providing three main services: risk assessment, bail recommendations, and supervision. Most pretrial service agencies have an assessment tool they will administer to determine risk for failing to appear at court and engaging in illegal behavior while awaiting trial. Usually under very strict time constraints, pretrial agency staff members will conduct a fact finding to assure the information gathered from all parties is true. They will then make recommendations to judicial officers regarding the best bail decision for the person accused of an offense. If the person is released under a condition of pretrial service supervision, the pretrial service agency will then provide the supervision services as needed in accordance to the risk assessment findings. Another component of services that some pretrial service agencies provide (that will not be examined here) are diversion programs in which people agree to undergo programming in exchange for having their record cleared of their charge. Not all pretrial service agencies provide diversion programs.

As of 2011, less than a third of the 3,007 counties in the U.S. are served by about 300 pretrial service agencies.⁹⁹ However, effective pretrial service agencies have been safely saving jurisdictions money since the 1960s by reducing the need to house people in jail and effectively monitoring them in the community prior to trial. One state to embrace pretrial services and ban commercial bail is the state of Kentucky. This state has recently expanded their pretrial service capacity through passage of the 2011 Penal Code and Controlled Substances Act. This legislation provided for increased pretrial release of people accused of offenses, as well as, increased use of citations rather than arrests for misdemeanor charges. Preliminary results show that over 17,000 fewer cases were processed when compared to previous year case numbers (due to increased citations)

and 738 fewer people were held in pretrial detention. An increase of 12 percent of people were released on non-financial bail options, such as ROR, and the number of people held because they were unable to make bail dropped from 34 to 25 percent. While the release rate of high-risk defendants remained steady, release of low and medium risk defendants increased to 84 percent and 66 percent, respectively. Despite the increase in releases, the appearance rate rose slightly from 90 to 92 percent and the public safety rate (those not charged with a new offense) rose from 90 to 94 percent. Kentucky's pretrial service agencies received an additional 1,285 referrals while seeing a 14 percent decrease in arrest among people under their supervision.¹⁰⁰

Court notifications are an effective way to ensure people appear for the court hearings.

People in the community who have trials pending may miss their court date for myriad reasons that are unrelated to an unwillingness to appear, ranging from lack of transportation, uncertainty about the criminal court process, or just plain forgetfulness. Pretrial service agencies have been effective in reducing the number of failure to appears (FTAs) for people under its supervision, but for the thousands of people who are released pretrial without pretrials supervision, FTAs may still be a challenge without a reminder of a court date. People who are incarcerated because they failed to appear to court are not generally considered to be a risk to public safety and keeping them in detention is a drain of public resources. Other localities who have implemented court date notification systems show promising results in reducing FTAs.

In general, court notification systems have been proven to reduce FTAs and save thousands in tax expenditures.¹⁰¹ FTAs require a substantial amount of paperwork, and add an extra burden to local

law enforcement of detaining those with warrants, overcrowding jails and increasing the daily cost it takes to care for persons in jail.¹⁰² Implementing a court date notification system can help reduce failure to appear rates, saving resources and reducing the number of people incarcerated.

Two forms of court notification systems are currently utilized by some jurisdictions—personal respondent systems and automated systems. Personal respondent systems can provide more information to defendants than automated systems. They can answer questions, saving both defendants and court clerks' time. These systems can be more expensive than automated systems as they require more administrative staff time.

- In Baltimore County, according to the Maryland Association of Local Management Boards' FY 2008 annual report, the Respondent Notification Program of just one full time staff improved court appearance rates by 15 percent (from 40 percent to 55 percent). FTA writ admissions between October 2007 and April 2008 were down by 45.4 percent when compared to the same time period one year earlier. Additionally, overall secure detention admissions between October 2007 and April 2008 were also down by 22.8 percent when compared to the same time period one year earlier.
- The Sheriff's Office of Jefferson County, Colorado, has two full-time employees dedicated to the court notification program, and they make about 50-100 calls a day. Weekly dockets are around 260-270 per week, and all people are called, except for those with counsel. In the first six months of the program, it reduced the FTA rate of the targeted population

by 52 percent, from 23 percent to 11 percent. In 2010, program specialists made over 16,000 calls, 75 percent (over 12,000) of which were considered successful. For successful calls, the average FTA rate for the year was 8.13 percent, never exceeding 10 percent. For unsuccessful calls, the average FTA rate was 27 percent.¹⁰³

Automated systems can provide automated phone calls, text messages, and emails for a large number of people in a short period of time and do not require too much staff time. With these systems, localities frequently contract out to private companies to provide a computerized telephone notification system. Fees for automated calling depend on the vendor selected, and may be on a per call basis or a monthly contract.

- At about 12 cents per call, the Miami County, Ohio Municipal Court has reduced FTAs from around 30 FTAs to 5 FTAs per week.¹⁰⁴
- The Los Angeles County Traffic Court's automated program calls people three days in advance of their traffic court appearances, making an average of 700 calls per night. Since the system went live at the end of March 2009, traffic court failure to appear rates have declined 20 percent resulting in significant operational cost savings for Los Angeles Superior Court at a time when cost savings are critical to the Court's continued operation.



- Multnomah County, Oregon Circuit Court's automated system calls people up to three times before each hearing and a 30-second, pre-recorded message reminds them of the time, date and location of their court hearings. In two years, FTAs in Multnomah County dropped from 29 to 16 percent, representing a nearly 45 percent decrease in the number of people who did not show up for court. The program, which was allotted \$40,000 in funding when launched in 2005, is estimated to save up to \$6.4 million worth of staff time each year. In 2007 alone, the program saved Multnomah County \$1.6 million by reducing FTAs.¹⁰⁵

Several other jurisdictions have reported dramatic reductions in FTAs due to court notification programs or pilots including Arapahoe County, Colorado which saw a reduction in FTAs from 21.4 percent to 9.9 percent in its county court and from 9.0 percent to 3.5 percent in its district court due to its personal respondent system.¹⁰⁶ Due to funding ending in 2011, they have continued to function with volunteers making calls to defendants prior to their court date. Fourteen counties in Nebraska piloted a notification program that used mailed post-cards to remind defendants of court dates and saw a reduction of FTAs from 12.6 percent to 9.7 percent.¹⁰⁷

A court notification program in Multnomah County, OR, reduced failure to appear rates by

45%
in two years.

MEASURES OF PRETRIAL DETENTION SHOULD BE IMPLEMENTED TO PROVIDE NATIONAL MEASUREMENTS OF OUR PRETRIAL PROCESSES AND DRIVE PRETRIAL REFORM EFFORTS.

“Considered in isolation, each shift away from accuracy [in pretrial proceedings] is defensible, but collectively the result is troubling.”

—Andrew D. Leipold¹⁰⁸

Because national data for measures of pretrial performance and outcomes are not collected, it is difficult to understand how pretrial processes affect the system, develop meaningful policy to drive change and protect effective services already in existence. The Bail Reform Act of 1966 was driven largely by the compelling results of program pilots and interventions implemented in New York City and elsewhere in the U.S. Consistent progress toward effective, safe, and fair pretrial policies, however, will depend on a better understanding of the state of pretrial issues on a regular basis. Gathering information for performance measures is not an exercise in data collection but a way to begin codifying beneficial policies that are not driven by for-profit interests but benefit U.S. residents through efficient use of taxpayer dollars and improved safety. Items that should be reported on a national level include number of bookings, number of risk assessment interviews, rationales for who is and is not assessed for risk, number of release by type of release (financial versus non-financial options), and average length of stay of people in pretrial, held in detention or released prior to their hearing.

DARIAN WATSON

COMMUNITY MEMBER



I was in jail for one year before my trial.

The first thing I remember is getting off the paddy wagon and then the handcuffs being put on you. That's an experience in itself. The second thing I would say would be the whole routine, the strip search thing. That can be humiliating, stripping down in front of a bunch of guys; then, being put in solitary. It varies for different people, but for me, it was sixteen hours alone. I guess that was the procedure at the time, but I wouldn't really know any better anyway—I was young. That was my first time going through the adult system, but I was still seventeen. Then I was placed on juvenile intake detail. This is the time when they give you your first phone call. That was pretty much it for that first actual day.

I saw the bail commissioner when I was in that holding cell. There was no bail. So I was there for an entire year after that. As soon as I knew that I was denied bail, it just set in: well, you're not going anywhere. No chance. It was really devastating for my immediate family, and especially traumatic for my mother. There was no hope of me getting out and my parents pretty much had the same attitude. I saw my family maybe once or twice a week, if that, and only if the jail wasn't on lockdown.

It would have been better if I had been released with some kind of supervision. You know, not just let me out to do what I please, but have restrictions placed on me, like home detention. That would have been better for both me and my family, and other aspects of my life. You know, being able to interact with my family, be in their physical presence and assure them that I'm okay all while still being able to attend school regularly.

I think there should be a more defined measure for how they determine who gets bail. And if possible, it shouldn't just be one judge who primarily handles all the bail decisions. That's a lot for one person to handle, especially if all they are doing is handling bail cases all day long. Me, personally, I didn't have any legal counsel at the time. You should have some legal counsel when you approach your first bail hearing instead of just representing yourself. Everybody should be entitled to that, and even if you have a lawyer, there should still be one on standby in case your lawyer is not able to make it. If you are up there alone, you are going to get a whole lot of lip. You are as lonely as an island down there.



National pretrial detention is currently captured in a way that is neither useful to the U.S. nor amenable to comparisons with other nations.

Currently, no data is being collected in a standardized way regarding pretrial detention across the nation for both misdemeanors and felonies. Specific and consistent data on national indicators of pretrial detention are needed to better inform the United States' status in pretrial services on a yearly basis. Although some data is collected through the State Court Processing Statistics project, this data comes from only the 75 most populous counties and usually is not published until many years after it is collected. It also focuses on felony cases, precluding an understanding of the impact of misdemeanors on the pretrial process as a whole.

At this time, the information available about pretrial populations is usually in the form of a percentage of the prison population. Using population percentages (such as the statistic that 60 percent of the jail population is currently held pretrial) does not effectively communicate the problems or successes of pretrial detention as the real meaning can be masked in changes to the overall national population and changes to the general prison population.¹⁰⁹ For example, the United States in 2009 was reported to have 21 percent of its prison populations in pretrial detention, meaning they were unsentenced. Other countries reported having the pretrial populations of their prisons as high as 69–97 percent. When relying on these numbers, it looks like the U.S. is doing a good job managing its pretrial populations. However, when considering the total number of people held pretrial compared to the general population, it is apparent that the U.S. held many more people in jail pretrial than other countries. The U.S. held 158 people pretrial per 100,000 incarcerated people while other countries held from 19 to 97 people pretrial per 100,000 incarcerated people. This shows

that the large number of people incarcerated in the U.S. minimizes the segment of that population that is held while awaiting trial and masks the magnitude of people affected by pretrial detention.

Better measures to track pretrial detention should be crafted to provide a more nuanced understanding of the United States' pretrial population and provide a platform for meaningful reform. In addition to measuring the size of the population in the pretrial process, a national measurement of how long people are in the pretrial process is also important. Even if there are few people in pretrial detention, if their length of stay is exorbitant, then their Eighth Amendment rights could be violated. Some realistic recommendations for measuring pretrial detention include:¹¹⁰

VOLUME INDICATORS—Measuring the magnitude of the population affected:

- Measure the pretrial population using raw numbers.
- Measure the pretrial population using rates per 100,000 in the general population.
- Measure the pretrial population using rates per total incarcerated population.

DURATION INDICATORS—Measuring how long people in pretrial are affected:

- Measure of the mean time spent pretrial—this will provide an average time spent from arrest to conviction by the pretrial population. While handy for quick estimates, this number can be easily skewed by a handful of cases of especially lengthy detention.
- Measure the median time spent pretrial per person—this will provide the amount of time spent by at least 50 percent of the population pretrial. This number will better explain extent of people impacted by pretrial detention.¹¹¹

Current pretrial data does not provide clarity around the different populations being held in detention.

Jurisdictions can improve their data by clarifying the proportion of their population that is held pretrial but not eligible for release due to factors, such as having another case pending, etc. A good example is evident in the pretrial population at the Los Angeles County Jail. About 70 percent of the population in this jail is held pretrial and advocates use this number to estimate the cost-savings of potential pretrial services. However, in reality, 25 percent of the L.A. County Jail pretrial population is sentenced on previous charges and have at least one pending charge. An additional 11 percent are held without bail. This means that only about 34 percent of those in L.A. County Jail are eligible for release under current statutes.¹¹²

Clarity is needed regarding the pretrial population held in “hold” categories, such as people in detention due to a violation of probation or parole, people in the Immigration and Customs Enforcement (ICE) detention system, people awaiting extradition to other jurisdictions, and people held in jails for the U.S. Marshals Service, to name a few. These situations may disqualify a person from pretrial release; so including these cases in the overall pretrial population may lead to inaccurate estimates regarding potential release and cost-savings. People who have had their probation or parole revoked pose additional considerations as their situation will differ depending on whether their arrest was due to a technical violation or a new charge.

Measurement of pretrial outcome and performance indicators could reveal effective pretrial service agency practices and areas for improvement.

Despite the billions of taxpayer dollars spent on pretrial detention, there are no national indicators in place to measure the impact of pretrial release and pretrial supervision on the justice system. Although pretrial service agencies should be protected from unreasonable and unrealistic demands for reporting, there are measures that can be used to reveal effective practice and areas for improvement. Accurate and complete data collection can also help protect pretrial services from unfounded criticism. In 2010, the National Institute of Corrections’ Pretrial Executive Network developed and published a list of suggested performance and outcome indicators to guide pretrial agencies in collecting data that could be aggregated into a national dataset. Their objective was to provide a framework that would help agencies in gathering the data needed to evaluate their performance against organizational goals and justice system expectations. With consideration of the agencies’ limited resources, steps should be taken to standardize the data collection of these indicators so that the system can prove its merit and benefit to society. These indicators were developed to be in compliance with existing national pretrial release standards (American Bar Association’s Criminal Justice Standards on Pretrial Release 2002, National Association of Pretrial Service Agencies’ Standards on Pretrial Release 2004).¹¹³

Considering the for-profit bail industry’s role in jail populations and having such an important role in determining who is released or detained, private bail bonding companies should be required to report on similar indicators. Particularly since for-profit bail bonding companies are only concerned with failures to appear, it is especially important to understand how well they perform on other success indicators.

Suggested Outcome and Performance Measures for Pretrial Service Programs

OUTCOME MEASURE	DEFINITION
Appearance Rate	The percentage of supervised defendants who make all scheduled court appearances.
Safety Rate	The percentage of supervised defendants who are not charged with a new offense during the pretrial stage.
Concurrence Rate	The ratio of defendants whose supervision level or detention status corresponds with their assessed risk of pretrial misconduct.
Success Rate	The percentage of released defendants who (1) are not revoked for technical violations of the conditions of their release, (2) appear for all scheduled court appearances, and (3) are not charged with a new offense during pretrial supervision.
Pretrial Detainee Length of Stay	The average length of stay in jail for pretrial detainees who are eligible by statute for pretrial release.
PERFORMANCE MEASURES	
Universal Screening	The percentage of defendants eligible for release by statute or local court rule that the program assesses for release eligibility.
Recommendation Rate	The percentage of time the program follows its risk assessment criteria when recommending release or detention.
Response to Defendant Conduct	The frequency of policy-approved responses to compliance and noncompliance with court-ordered release conditions.
Pretrial Intervention Rate	The pretrial agency's effectiveness at resolving outstanding bench warrants, arrest warrants, and capiases.

Indicators as provided by "Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field," National Institute of Corrections, August 2011.

PART 6

RECOMMENDATIONS

There is no reason to continue the practice of requiring money in order to be released while waiting for a case to be resolved. That this practice continues seems to be a testament to the resilience of the status quo and influence of industries that stand to gain from the use of money bail. Considering that more effective ways exist to help people through the judicial process that better serve all those involved—including the accused, victims and innocent people, low income communities and taxpayers—the use of money bail in the U.S. should be discontinued.

1. ELIMINATE MONEY BAIL.

Some U.S. jurisdictions have all but eradicated the use of money bail in their pretrial justice process. These jurisdictions typically have a robust pretrial services agency, validated risk assessments, and other processes in place to assure defendants return to the community safely and attend their court hearings.

Case study: Washington, D.C.

Since 1968, the District of Columbia has had a robust pretrial services system which implements all the provisions of the Bail Reform Act of 1966. Due to their extremely limited use of nonfinancial bail options, for-profit bail bonding companies, although not banned, are nonexistent since there is not a market for their business.¹¹⁴ Due to close collaboration between the D.C. Pretrial Services Agency and law enforcement, corrections, and the judicial system, 80 percent of people charged with an offense are released on nonfinancial bail options to await resolution of their charge while 15 percent are kept in pretrial detention. Only 5 percent are released using some form of financial bail, but

there is no use of for-profit bail bondsmen services. The Pretrial Services Agency has reported that 88 percent successfully complete the pretrial process by appearing in court and not being rearrested.¹¹⁵

While eliminating the use of money bail may be challenging, it is possible to begin taking steps in this direction through the following:

- *Ban the use of for-profit commercial bail bonding companies.*
- *Replace bail schedules with validated risk assessments.*
- *Increase capacity to provide pretrial services that include risk assessments and supervision.*
- *Implement a deposit bond program with the courts.* The state of Illinois implemented a 10 Percent Deposit Plan in 1963 in order to eliminate the need for for-profit bail bonding companies. Although money bail is still used, the 10 Percent Deposit Plan allows defendants to pay the “10 percent fee”, typically paid to bail bondsmen as a non-refundable fee, to the courts with the agreement that they will be liable for the full bail amount if they fail to



SPURGEON KENNEDY

DIRECTOR OF RESEARCH AND ANALYSIS, PRETRIAL SERVICES AGENCY OF THE DISTRICT OF COLUMBIA



There's no reason for money bail. It ought to be abolished.

One of the things that I get to do occasionally is ask judges across the country why they set bail. I get some of the most inappropriate reasons that have nothing to do with why bail is supposed to be set. "Well, I know this guy is going to get probation, so I'm going to show him what the inside of a jail looks like." Or, "I want his parents and his family to feel some pain about this." Or, they like bail bondsmen; they've always set money, so why do anything different? Unfortunately, money bail is the prevalent type of release, or I should say detention, in this country. Most people in jail today are there because they cannot afford or will not post an amount of money that a judge set on them. Usually, that amount of money has absolutely nothing to do with your risk of getting back to court or being a danger to the community.

One of the things that D.C. has that most jurisdictions don't is a preventive detention statute. If you talk to judges who use money a lot, one of the things that they will tell you is, "I don't have an alternative. There's no other way for me to address a truly dangerous defendant." In D.C., we've given judges that option. Since 1970, we've had laws on the books that have allowed judges to hold those defendants pretrial, by statute, if they believe that those defendants are too dangerous to be released back into the community. That detention works in two stages: first, you make the initial decision that this person qualifies for preventive detention. Second, you have what is called a preventive detention hearing, where the defense and the prosecution present their sides and the judge decides whether the defendant warrants further detention.

About 15 percent of the defendants who come through our lockup here in D.C. are going to be detained pretrial by statute. So instead of a judge throwing out a cash amount and crossing his or her fingers that this is enough to keep you in jail, they have a statutory way of doing detention that respects the defendant's due process rights. It's taken some time to implement, but it's a much more honest way of identifying those defendants who pose a serious threat to community safety. It's a far more honest way of keeping them detained than money.

The other 85 percent are usually released on conditions of supervision. At some point, 5,500 or 6,000 defendants are under our supervision at any given time during the year. We supervise the majority of defendants who do get released, and usually those conditions of supervision are things such as drug testing; reporting to a case manager; for those defendants who we believe pose a greater threat to community safety, we have the options of electronic surveillance, or more reporting to case managers; we also have substance abuse treatment and mental health services connections when we assess defendants under our supervision as needed.



appear or are re-arrested prior to and during the trial process. They are refunded this 10 percent fee, paying only a small administrative fee (typically 3 percent).

2. BAN FOR-PROFIT BAIL BONDING COMPANIES.

Four states have banned the involvement of for-profit, private citizen businesses in the judicial process: Kentucky, Wisconsin, Illinois, and Oregon. Around the U.S., various jurisdictions have chosen to ban bail bondsmen even if their state has not, such as Broward County, Texas,¹¹⁶ and Philadelphia, Pennsylvania. As money bail already presents a number of problems, the addition of a for-profit entity only serves to reinforce the practice of money bail. For-profit bail bonding companies have an interest in preserving this practice as it is the source of their income, at the expense of individuals and their families, the criminal justice system, and taxpayers. In the event that a financial release option is used, it is more just to process the bond through the court in a way that will not cause the defendant to lose a portion of that bond through fees to a for-profit bondsman.

3. INCLUDE THE VOICES OF ALL INVOLVED PARTIES TO ENSURE THAT REFORMS TO THE PRETRIAL PROCESS ARE MEANINGFUL AND EFFECTIVE.

As victims and their advocates provide a unique and critical understanding of the harm done and potential harm that could be done, it is important to build them into the pretrial release decision making process. As issues differ depending on the

harm done (for example, domestic violence issues will be different than financial fraud issues), a systematic consideration of victim advocates' perspective or guidance may help in determining the most effective pretrial processes that will ensure safety to the community. Victim advocates will also be supportive in creating a more just process as victims are interested in seeing the person who actually committed the harm be held accountable.

4. EXPAND COMMUNITY EDUCATION PROGRAMS, SUCH AS THE NEIGHBORHOOD DEFENDANT RIGHTS PROGRAMS, THAT INFORM PEOPLE IN THE COMMUNITY ABOUT HOW TO NAVIGATE THE PRETRIAL PROCESS.

The confusing and inherently coercive pretrial process is challenging even for those with adequate financial resources and educational background. Understanding the process, legal rights, and what to expect could help people navigate the part of the case process more successfully. This is particularly important since the portion of the process is so important to the outcomes of the case. However, many people may be susceptible to fallacies in the pretrial process since they are concerned about responsibilities outside the jail. At that point, it is difficult to estimate the collateral consequences of a criminal record beyond the immediate impact of losing a job or not being there to take care of a dependent. Informing communities of this process and the implications of their decisions could reduce the number of false pleas, reduce bail amounts, and promote a better, more just pretrial process.

5. USE CITATIONS AND SUMMONS TO REDUCE THE NUMBER OF PEOPLE BEING ARRESTED AND PROCESSED THROUGH JAILS.

Police officers should be enabled to remain on the streets doing their job by using citations and summons instead of transporting every person arrested to a booking facility. If more information is necessary to determine if release is safe, police officers, working alone or in conjunction with pretrial service agents, can use risk assessments to safely gather the person's personal information and conviction history.

6. USE STANDARDIZED, VALIDATED RISK ASSESSMENTS TO DETERMINE WHO TO RELEASE AND HOW TO RELEASE.

Every jurisdiction should invest in a validated risk assessment for their locality. Risk assessments help when implementing citation programs, as well as, in developing optimal pretrial release determinations that benefit both the jurisdiction, the jails, and the person charged with an offense. Before making a risk assessment mainstream, it is important to ensure the risk assessment put in place is appropriate. Standardized, validated risk assessments are crucial to maintaining objectivity in the pretrial process. These tools produce data that provide for informed bail decisions and support judicial officials in having a reliable, bias-free opinion driving his or her determination. Validated risk assessments are gaining popularity as judges look for more objective ways to conduct the pretrial process

and many states can provide models for how to implement this practice into a jurisdiction. Some jurisdictions are currently using risk assessments that have not been validated, which is an ineffective practice. Not only can these reduce public safety, they may also reinforce racial and ethnic biases in the system. It is vitally important to conduct validation studies to ensure that these tools accurately assess defendants in those jurisdictions and to develop a practical, effective tool for everyday use. Once the proper tool is in place, a process for applying assessment findings into pretrial decisions must be implemented. Judicial officials and all parties involved must be educated about the tool and how it can assist in making meaningful decisions.

7. IMPLEMENT MEASURES OF PRETRIAL DETENTION AND RELEASE SERVICES TO EVALUATE CURRENT PROGRAMMING AND BETTER INFORM PRETRIAL REFORM EFFORTS.

Currently, no data is being collected in a standardized way regarding pretrial detention across the nation for both misdemeanors and felonies. Little is being consistently measured across the many pretrial service agencies regarding the outcomes of their services. In order to better understand the impact of pretrial detention and how the U.S. is performing compared to other nations, national data on pretrial detention should be gathered from jails and prisons that hold people who are going through the court process. Additionally, within reasonable expectations, pretrial service agencies should utilize the measures already created to provide the public with a clear picture of their work and effectiveness in preventing failure to appear and re-arrests.

8. FOR-PROFIT BAIL BONDING BUSINESSES SHOULD BE REQUIRED REPORT ON PRETRIAL MEASURES TO BETTER TRACK FORFEITURE RATES, FTA RATES, AND OTHER PRETRIAL PERFORMANCE AND OUTCOMES INDICATORS.

For-profit bail bonding companies are responsible for the release of millions of defendants each year. At this time, there is little regulation or oversight over this crucial aspect of public safety. Due to the extensive use of money bail, some people accused of offenses are assigned money bail when a better form of pretrial release would have provided greater public safety. Bail bondsmen then exercise a tremendous amount of power over people in detention by choosing, upon factors of their own financial gain, for whom they will post a bond.¹¹⁷ Bondsmen also have the ability to put a person they have posted a bond for back into jail at any time, for any reason. For-profit bondsmen play a crucial part in the justice system that affects the safety to the public at large, as well as, people's rights to liberty. Only when for-profit bail bonding companies are required to report on indicators of pretrial performance and outcomes will policymakers be able to make educated decisions around the use of bail and bail bonding as opposed to non-financial release options.

9. UTILIZE PRETRIAL SUPERVISION AGENCIES.

Evidence-based practices, such as screenings with a validated risk assessment, are important to ensure

the effectiveness of the programs. Pretrial services can assist both law enforcement and judicial officers to promote citations and appropriate bail determinations by providing risk assessment and fact-finding services. Pretrial service agencies can provide more accurate and appropriate bail recommendations to judicial officials to aid in the bail determinations that will in compliance with the law. Using the findings from their risk assessments, pretrial service agencies can provide the pretrial supervision services most appropriate for each accused person to ensure they complete the pretrial process successfully. Given that pretrial agencies may also provide other services that can help people while awaiting trial (such as treatment, job placement, etc.), longer terms outcomes of money bail versus pretrial services should be examined. Cost studies confirm that it is much more affordable to assess and monitor people in the community through pretrial services rather than keep them in a jail. In order to reduce communities' reliance on jails, pretrial services should be expanded to allow for the safe and informed release of people awaiting trial. Several jurisdictions have fully functioning pretrial service agencies that have a proven record of success; and the Pretrial Justice Institute has provided a Pretrial Services Program Implementation Starter Kit to assist jurisdictions in planning and implementing pretrial services in their area.¹¹⁸

10. USE COURT NOTIFICATIONS.

Through personally manned or computerized programs, reminding people about upcoming hearings has proven to reduce failure-to-appear rates. Notification systems should be a part of every court budget to ensure dollars are not spent trying to track or punish people unnecessarily.

11. RESEARCH THE EFFECTIVENESS OF CURRENT AND PROPOSED PRETRIAL PRACTICES TO ENSURE THE ACTIVITIES WILL LEAD TO DESIRED OUTCOMES.

The paucity of research around the use of money bail and its impact on community safety and pretrial compliance is startling. Analyses researching the use of money bail and resulting outcomes within various groups of the population should be conducted. A few areas where a lack of research currently exists include the following, among many others:

- How do money bail outcomes differ between people of different socioeconomic groups
- Parameters within which the practice of preventive detention is effective or not effective
- The loss of income on the national level due to pretrial detention

12. AMEND THE BAIL REFORM ACT AND POLICIES TO COMPLY WITH THE EQUAL PROTECTION CLAUSE.

Current practices allow for people to be treated differently within the criminal justice system on account of their financial status. This is believed to be a violation of the Equal Protection Clause and should be remedied. Elimination of money bail is an important step toward eliminating disparities in pretrial outcomes due to financial status.

13. BETTER UTILIZE TECHNOLOGY TO IMPROVE PRETRIAL PROCESSES.

Pretrial reform is a daunting task for cities and counties operating on a stringent budget. Although the cost savings of pretrial reform is becoming clearer, determining how to shift funds to begin or expand services while maintaining current systems can be challenging. Software is now available allowing modeling of communities and interventions so that jurisdictions can test changes to their systems and estimate outcomes before actually instituting changes. Electronic software can also be used to allow risk assessments, as well as, fingerprinting and positive identification to be conducted anywhere quickly. As noted previously, electronic court notification systems can automatically remind people of upcoming hearings to effectively reduce failure-to-appear rates.

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